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ARTICLE

FOREIGN AFFAIRS, NONDELEGATION, AND THE MAJOR QUESTIONS DOCTRINE

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Some of the Supreme Court Justices and scholars who support a reinvigoration of the nondelegation doctrine would allow for an exception for grants of authority relating to foreign affairs. Others have criticized such an exception as unprincipled or

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as reflecting improper "foreign affairs exceptionalism." This Article argues against a foreign affairs exception to the nondelegation doctrine but contends that the doctrine should be applied less strictly when a statutory authorization relates to an area of independent presidential power. The President has more independent power relating to foreign affairs than domestic affairs, so this limitation on the nondelegation doctrine will do more work in the foreign affairs area. But the President does not have unlimited power over foreign affairs and has some independent constitutional power relating to domestic affairs, so it is inaccurate and potentially misleading to refer to a "foreign affairs" exception. After establishing this point, the Article identifies three circumstances in which independent presidential power reduces nondelegation concerns, which we call "redundant authorizations," "unlocking authorizations," and "independent discretion authorizations." The Article then analyzes a number of broad statutory authorizations relating to foreign affairs and domestic security and finds that some but not all of them can be justified by reference to the President's independent powers. The Article concludes by considering the relevance of this analysis to the application of the major questions doctrine, and it explains why that doctrine likely poses less of a threat to authorizations related to foreign affairs than scholars have maintained.

INTRODUCTION

Despite the perennial debates about the President's constitutional authority, most important actions that presidents take today, including in foreign affairs, rest at least in part on statutory authorization. President Biden's aid to Ukraine,[1] and his sharp restrictions on economic interaction with China,[2] purport to be authorized by statutes, as did many of President Trump's controversial actions, including his travel ban and border wall construction.[3] The "war on terrorism" following the 9/11 attacks has been conducted primarily based on authorizing statutes.[4] Since the 1930s, most binding international agreements concluded by presidents have been "congressional–executive agreements"—that is, agreements ostensibly authorized by Congress—rather than Article II treaties or "sole" executive

1 *See, e.g.*, Exec. Order No. 14,065, 87 Fed. Reg. 10293, 10293 (Feb. 21, 2022) (citing the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et. seq.*; National Emergencies Act, 50 U.S.C. § 1601 *et. seq.*; Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(f); and 3 U.S.C. § 301 (defining the presidential delegation authority)). For a general overview of the Biden Administration's actions concerning Ukraine and relevant statutory authorities, see CHRISTINA L. ARABIA, ANDREW S. BOWEN & CORY WELT, CONG. RSCH. SERV., IF12040, U.S. SECURITY ASSISTANCE TO UKRAINE (2024).

2 *See, e.g.*, Exec. Order No. 14,117, 89 Fed. Reg. 15421, 15421 (Feb. 28, 2024) (citing the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*; National Emergencies Act, 50 U.S.C. § 1601 *et seq.*; and 3 U.S.C. § 301); Exec. Order No. 14,105, 88 Fed. Reg. 54867, 54867 (Aug. 9, 2023) (citing the same authorities); Exec. Order No. 14,032, 86 Fed. Reg. 30145, 30145 (June 7, 2021) (same).

3 *See, e.g.*, Proclamation No. 9723, 83 Fed. Reg. 15937 (Apr. 10, 2018) (citing the Immigration and Nationality Act, 8 U.S.C. §§ 1182(f), 1185(a); and 3 U.S.C. § 303) (travel ban), *revoked by* Proclamation No. 10141, 86 Fed. Reg. 7005 (Jan. 20, 2021); Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019) (citing the National Emergencies Act, 50 U.S.C. §§ 1601 *et seq.*, 1631; 10 U.S.C. § 12,302 (military "Ready Reserve" provision); and 10 U.S.C. § 2808 (military construction provision)) (declaring national emergency on the United States–Mexico border); Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 25, 2017) (border wall construction) (citing the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*; Secure Fence Act of 2006, Pub. L. 109-367, 120 Stat. 2638 (2006); and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, div. C, Pub. L. 104–208, 110 Stat. 3009, 3009-3546), *revoked by* Exec. Order No. 14,010, 86 Fed. Reg. 8267, 8270 (Feb. 2, 2021).

4 *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2052-54 (2005); Curtis A. Bradley & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L L. 628, 629-38 (2016).

agreements.[5] As these and many other examples suggest, the law governing statutory authorization is central to questions of executive power. And this, in turn, means that questions can arise in various foreign affairs contexts about Congress's power to delegate authority to the executive branch.

In the mid-1930s, the Supreme Court famously applied a "nondelegation doctrine" to strike down two New Deal statutes. In those decisions, the Court held that, although the executive branch could be allowed to make "subordinate rules" to implement a statutory policy, Congress had to make the underlying policy determination.[6] Since then, however, the Court has not invalidated a single statute under the nondelegation doctrine. While nominally insisting that Congress provide an "intelligible principle" to guide the exercise of delegated authority, in practice the Court has deferred to Congress's judgments about the appropriate breadth of authority to convey to the executive branch. But this might change. In recent years, a majority of Justices on the Court—in various separate writings—have expressed support for reinvigorating the nondelegation doctrine.[7]

At least some of the Justices who support revival of the nondelegation doctrine would allow an exception for delegations relating to foreign affairs.[8] Some scholars have similarly endorsed a foreign affairs exception.[9] Others, however, have sharply criticized the existence of such an exception on historical and conceptual grounds.[10] This debate is important. If the nondelegation doctrine is reinvigorated and there is no persuasive reason for carving out certain foreign affairs authorizations, many broad areas of executive branch discretion that have long been taken for granted might become legally suspect.

This Article does not take sides in the debate over whether the relatively lax nondelegation doctrine should be preserved or tightened. We focus instead on the ostensible foreign affairs exception recognized by both current doctrine and nondelegation revivalists, which is undertheorized in the case law and in the literature. Our aim is to provide a more coherent and defensible account of why the nondelegation doctrine might apply less strictly to some foreign affairs authorizations. The account we give is partly descriptive in the sense that it seeks to make sense of two centuries of elusive Supreme Court case law on the topic. But it is also partly normative in that

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5 *See* Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629, 632-33, 638 (2020).

6 *See infra* Section I.A.

7 *See id.*

8 *See infra* Section I.B.

9 *See id.*

10 *See infra* Section II.A.

our account turns on arguments about how the case law should be understood, along with related structural constitutional considerations. While we engage with originalist arguments throughout this Article, our account does not purport to be originalist.

The central claim of the Article is that the supposed foreign affairs exception is better understood as a qualification that concerns situations in which a statutory authorization relates to an independent presidential power—that is, to a power that the President can exercise on his or her own authority. There are two reasons to emphasize the President's *independent* power rather than the President's *foreign affairs* power. The first is that "foreign affairs" is overbroad. The President does not have unlimited authority over foreign affairs and sometimes, as in domestic affairs, needs congressional authorization or approval in order to act. The second is that the President has some independent powers relating to domestic affairs.

An important contribution of this Article is to describe the President's relevant independent powers in detail, and then to explain how the independent powers qualification to the nondelegation doctrine should operate in practice. As we show, proper application of the qualification is more complex and subtle than courts and scholars invoking a "foreign affairs" exception have assumed. Importantly, the independent powers qualification does not require that the President have the constitutional power to take the specific action that Congress authorizes. If that were required, the authorization would be doing no legal work. As we will explain, there are *three types* of linkages between independent presidential power and congressional delegations for which delegation concerns are reduced, which we label "redundancy," "unlocking," and "independent discretion." We provide a number of illustrations to show how these linkages do and should work.

It is far from clear, we should note, that the Supreme Court will in fact reinvigorate the nondelegation doctrine. Since the New Deal period, some of the concerns underlying the doctrine have been addressed through canons of construction or statutory interpretation rather than constitutional invalidation,[11] and this trend might continue. Most significantly, in recent years the Court has developed a doctrine that presumes that in certain contexts involving "major questions," administrative agencies cannot act in ways that have large "economic and political significance" absent "clear

11 *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."). For discussion of this phenomenon, see generally Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181 (2018), and Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

congressional authorization."[12] While the Court's development of this major questions doctrine could be a first step towards a reinvigoration of the nondelegation doctrine, it might instead be *an alternative* to such reinvigoration.

Either way, the major questions doctrine has seemed to many scholars to threaten executive power in the foreign affairs realm. These scholars worry that many executive actions relating to foreign affairs and national security have immense economic and political significance yet rest on statutory authorizations that may not satisfy the clear authorization requirement.[13] As we explain, however, the logic of the major questions doctrine suggests that it should not apply to many statutory authorizations relating to foreign affairs, national security, and domestic security. This conclusion is strongest if the doctrine is conceived of as a practical contextual tool for discerning congressional intent, but it also follows in many situations even if the doctrine is a substantive canon designed to avoid constitutional concerns.

Part I describes the nondelegation doctrine, its potential revival, and the purported foreign affairs exception to it. Part II argues that, as a matter of constitutional structure and doctrinal coherence, there is no "foreign affairs" exception to the nondelegation doctrine. Rather, the decisions that have suggested such an exception are best understood as standing for the proposition that the nondelegation doctrine is relaxed in situations in which the President has independent power relating to the subject of the delegation—power that may or may not concern foreign affairs. This Part of the Article also provides an overview of independent presidential power and describes various reasons why the existence of such power can reduce delegation concerns. Part III provides examples of broad congressional authorizations and analyzes them under the framework we have provided. Some, but not all, of these authorizations are supported by the independent power rationale. When the authorizations are not supported by that rationale, their constitutionality (assuming a reinvigorated nondelegation doctrine) likely turns on other considerations, such as longstanding historical practice. Part IV discusses the relevance of the major questions doctrine to various statutory authorizations.

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12 West Virginia v. EPA, 142 S. Ct. 2587, 2608-09 (2022).

13 *See, e.g.*, Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 121 MICH. L. REV. 55 (2023); Kristen E. Eichensehr & Oona A. Hathaway, *Major Questions About International Agreements*, 172 U. PA. L. REV. 1845 (2024); Elena Chachko, *Toward Regulatory Isolationism? The International Elements of Agency Power*, 57 U.C. DAVIS L. REV. 57 (2023).

I. THE NONDELEGATION DOCTRINE AND FOREIGN AFFAIRS

This Part describes the nondelegation doctrine and the possibility that it will be reinvigorated by the Supreme Court. It then describes what many have claimed is a foreign affairs exception to the doctrine.

A. *The Nondelegation Doctrine*

The basic idea underlying the nondelegation doctrine is that the Constitution assigns legislative authority only to Congress, and that the power to legislate involves the power to make certain policy choices. Under this view, Congress can authorize the executive branch to implement and enforce policy choices that Congress has made, but it cannot delegate the responsibility for developing policy in the first instance. There are various formulations of this claim, concerning, for example, the breadth of the delegation, its overall importance, or its effect on private rights, but this is the core idea.[14]

Both formal and functional justifications have been offered in support of such a limitation. The formal justifications include the fact that Article I of the Constitution vests "[a]ll legislative Powers herein granted" in Congress, which might suggest that these powers cannot be assigned to others.[15] The functional justifications include the contention that broad delegations dilute political accountability and are more likely to lead to intrusions on individual liberty.[16]

The Supreme Court applied the nondelegation doctrine in the mid-1930s to invalidate two New Deal statutes. One of the statutes authorized the President to prohibit the transportation of petroleum and petroleum-based products in interstate and foreign commerce if they were produced or withdrawn in excess of state authority.[17] The other authorized private industry to develop "codes of fair competition" that, if accepted by the

14 For a sample of the scholarly debates over whether the Constitution imposes a nondelegation constraint, compare Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002), arguing that it does not, with Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002), arguing that it does. *See also, e.g.*, Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (responding to the Posner and Vermeule article); Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEXAS L. REV. 89, 97 (2022) (arguing that, contrary to what proponents of the nondelegation doctrine contend, agency rulemaking is not an exercise of legislative power).

15 *See, e.g.*, Lawson, *supra* note 14, at 337.

16 *See* Sunstein, *The American Nondelegation Doctrine*, *supra* note 11, at 1189-90.

17 *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

President, would become judicially enforceable.[18] The Court did not dispute in these cases that Congress could "leav[e] to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."[19] But it concluded that Congress had failed to declare the relevant policy and instead had improperly left that determination to others.[20]

Although these are the only statutes the Court has ever invalidated based on the nondelegation doctrine, the Court previously suggested that there were limits on Congress's authority to delegate. It did so in 1825, in *Wayman v. Southard*, an opinion authored by Chief Justice Marshall.[21] In that case, the Court rejected a nondelegation challenge to a statute that authorized federal courts to develop rules of procedure, including those governing enforcement of their judgments. Although the Court found the authorization to be constitutional, it acknowledged that Congress could not "delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."[22] The Court also noted, however, that

> [t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[23]

The Court also assumed nondelegation limits in an 1892 decision, *Field v. Clark*.[24] That case concerned the constitutionality of a directive to the President to reimpose tariffs on certain products "whenever, and so often as the President shall be satisfied that the government of any country producing [such products]" is imposing duties on U.S. agricultural products that the President "deem[s] to be reciprocally unequal and unreasonable . . . ."[25] The Court accepted a nondelegation limitation and, indeed, described it as "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[26] But it concluded

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18 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *cf.* Carter v. Carter Coal Co., 298 U.S. 238, 311-12 (1936) (finding a delegation of authority to private parties to be unconstitutional on due process grounds).

19 *Panama Refining*, 293 U.S. at 421; *see also Schechter Poultry*, 295 U.S. at 530 (quoting this passage from *Panama Refining*).

20 *See Panama Refining*, 293 U.S. at 430; *see also Schechter Poultry*, 295 U.S. at 541-42.

21 23 U.S. (10 Wheat.) 1 (1825).

22 *Id.* at 42-43.

23 *Id.* at 43. For a similar observation, see United States v. Grimaud, 220 U.S. 506, 517 (1911) ("It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations.").

24 143 U.S. 649 (1892).

25 *Id.* at 680.

26 *Id.* at 692.

that the tariff law did not violate this limitation because "[i]t does not, in any real sense, invest the President with the power of legislation."[27] Among other things, the Court pointed out that, when the President makes the determination referenced in the statute, it becomes "his duty to issue a proclamation declaring the suspension [of tariff-free importation], as to that country, which Congress had determined should occur."[28]

Other than in the New Deal decisions, however, the Court has not invalidated a single statute under the nondelegation doctrine.[29] Nominally, the Court has insisted since a 1928 decision, *J.W. Hampton, Jr. & Co. v. United States*, that the legislature "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform . . . ."[30] But in practice it has deferred to Congress's judgments about the proper breadth of the delegations.[31]

To be sure, the Court has continued to insist that Article I's vesting of legislative powers in Congress "permits no delegation of those powers . . . ."[32] It has further described the nondelegation doctrine as "rooted in the principle of separation of powers that underlies our tripartite system of Government."[33] The "intelligible principle" requirement "seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes."[34] As the Court noted in *Panama Refining Co. v. Ryan*, "in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend."[35] Nevertheless, the Court has repeatedly turned back

27 *Id.*

28 *Id.* at 693.

29 In *Clinton v. City of New York*, 524 U.S. 417 (1998), however, the Court held that the Line Item Veto Act was unconstitutional because, unlike ordinary delegations, it effectively delegated to the President the authority "to change the text of duly enacted statutes." *Id.* at 447.

30 276 U.S. 394, 409 (1928).

31 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001) ("We have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))); *see also Mistretta*, 488 U.S. at 373 (majority opinion). The Court's applications of the nondelegation doctrine to invalidate legislation both occurred in 1935. As Cass Sunstein quipped some time ago, the nondelegation doctrine "had one good year, and 211 bad ones (and counting)." Sunstein, *Nondelegation Canons*, *supra* note 11, at 322.

32 Whitman, 531 U.S. at 472.

33 Mistretta, 488 U.S. at 371.

34 Loving v. United States, 517 U.S. 748, 771 (1996).

35 293 U.S. 388, 430 (1935).

nondelegation challenges to even very broad grants of discretionary authority.[36]

The nondelegation doctrine, in short, has been essentially dormant since the 1930s. The Supreme Court has repeatedly reaffirmed the doctrine's existence but has failed to give it any bite. To the extent that delegation concerns have played a role in the Court's jurisprudence, it has been an indirect one in the realm of statutory interpretation rather than constitutional review.[37] This indirect role is most evident in recent years with the Court's development of a major questions doctrine that some Justices tie to delegation concerns and that presumes that Congress does not authorize agencies to make certain significant policy decisions.[38]

In the last decade, a number of Justices have sought to reinvigorate the nondelegation doctrine.[39] Justice Thomas's concurring opinion in *Department of Transportation v. Association of American Railroads* criticized the "boundless" intelligible principle test and argued that the government may "create generally applicable rules of private conduct only through the constitutionally prescribed legislative process" and not through the exercise of executive power.[40] In *Gundy v. United States*, Justice Gorsuch in dissent, joined by Chief Justice Roberts and Justice Thomas, also criticized the intelligible principle test.[41] He maintained that a revived nondelegation doctrine would require Congress to enact all "generally applicable rules of [private] conduct" with three qualifications: the executive branch may "fill up the details," Congress may condition the application of its laws on executive branch factfinding, and Congress may assign to the other branches "certain non-legislative responsibilities" related to their independent powers.[42] Justice Alito wrote separately to note that he would support reconsideration of the nondelegation doctrine in a case in which a majority of the Justices were willing to do so.[43] Justice Kavanaugh did not participate in *Gundy* but a few months later stated

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36 *See* Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) ("[W]e have over and over upheld even very broad delegations."); *Loving*, 517 U.S. at 771 (noting that, since the New Deal decisions, "we have . . . upheld, without exception, delegations under standards phrased in sweeping terms").

37 *See* Sunstein, *Nondelegation Canons*, *supra* note 11, at 316 ("Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so.").

38 *See infra* Section IV.A.

39 Two generations earlier, Chief Justice Rehnquist did so as well. *See* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring in the judgment).

40 575 U.S. 43, 77 (2015) (Thomas, J., concurring in the judgment).

41 *Gundy*, 139 S. Ct. at 2139-40 (Gorsuch, J., dissenting).

42 *Id.* at 2133, 2136-37.

43 *Id.* at 2131 (Alito, J., concurring in the judgment).

that Justice Gorsuch's *Gundy* dissent "may warrant further consideration in future cases."[44]

Many of the Justices who favor a reinvigoration of the nondelegation doctrine also support an originalist approach to constitutional interpretation—that is, they support interpreting the Constitution based on its original meaning—and elements of the Gorsuch opinion mentioned above were grounded in this methodology.[45] Not surprisingly, therefore, there has recently been significant scholarly consideration of whether and to what extent originalism supports a nondelegation doctrine.[46]

B. *The Purported Foreign Affairs Exception*

The foundational Supreme Court decision in support of a foreign affairs exception to the nondelegation doctrine is *United States v. Curtiss-Wright Export Corp*.[47] That case involved a 1934 statute that made it a crime to sell arms or munitions in the United States to the parties to the Chaco War in Latin America (or persons acting in their interests) if the President, after conferring with "other American Republics," issued a proclamation that an arms sale ban "may contribute to the reestablishment of peace between" the warring parties.[48] The statute further authorized the President to make "limitations and exceptions" to the ban, and prescribed a penalty of a fine of up to $10,000, a two-year prison term, or both.[49] The President issued such a proclamation.[50] Defendants indicted for violating the law challenged it on the ground that it gave the President "unfettered discretion . . . controlled by no standard," and resulted in "Congress abdicat[ing] its essential functions and delegat[ing] them to the Executive."[51]

Even though *Curtiss-Wright* arose during the New Deal period when the Court was enforcing the nondelegation doctrine with some vigor, the Court

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44 Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

45 *See Gundy*, 139 S. Ct. at 2133-35 (Gorsuch, J., dissenting) (focusing on the understandings of the constitutional Framers).

46 Compare, for example, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021) ("The nondelegation doctrine has nothing to do with the Constitution as it was originally understood."), with Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1494 (2021) ("[T]here is significant evidence that the Founding generation adhered to a nondelegation doctrine."). For earlier articles arguing that originalism supports a nondelegation limitation, see Lawson, *supra* note 14; Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265 (2001).

47 299 U.S. 304 (1936).

48 *Id.* at 312.

49 *Id.*

50 *Id.* at 312-13.

51 *Id.* at 315.

rejected the challenge. In an opinion by Justice Sutherland, the Court said that it was agnostic about whether the delegation would be constitutional had it "related solely to internal affairs."[52] The issue in the case was different, it said, because the law fell "within the category of foreign affairs" since it sought to "afford a remedy for a hurtful condition within foreign territory[.]"[53] The Court explained that "the powers of the federal government in respect of foreign or external affairs" were, in contrast to its powers over internal affairs, not derived from pre-constitutional state legislative powers.[54] Rather, reasoned the Court, they passed at the Revolution from Great Britain to the United States in its corporate or national capacity.[55] Because the United States' "powers of external sovereignty did not depend upon the affirmative grants of the Constitution," the Court implied that delegation limits based on the enumerated power structure of the Constitution did not apply.[56]

To this rationale based on extraconstitutional authority, the Court added a quite different rationale based on the separation of powers. This argument began from the premise that the President's authority in this context rested not on the congressional authorization alone, but rather on that authority "*plus* the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . ."[57] Because the President required more flexibility in conducting foreign relations, Congress in the "international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[58] It followed, the Court concluded, that the authorization to the President to institute and craft the arms sale ban was not an unconstitutional delegation.[59]

The Court in *Curtiss-Wright* never identified a textual basis in Article II for its conclusions about the President's independent powers in foreign affairs. It instead gave functional reasons for these powers, including the President's unique ability to act with secrecy, unity, and dispatch.[60] And it supported its ultimate conclusion about the foreign relations exception to the nondelegation doctrine by reviewing what it described as an "unbroken

52 *Id.*
53 *Id.*
54 *Id.* at 315-18.
55 *Id.* at 316.
56 *Id.* at 318.
57 *Id.* at 320 (emphasis added).
58 *Id.*
59 *Id.* at 329.
60 *Id.* at 319-22.

legislative practice which has prevailed almost from the inception of the national government to the present day."[61] This long practice, the Court suggested, amounted to a gloss on constitutional meaning that supported its conclusions about the foreign affairs exception to the nondelegation doctrine.[62]

There was no clear judicial precedent before *Curtiss-Wright* for a foreign affairs exception to the nondelegation doctrine.[63] The Court in *Curtiss-Wright* noted that *Panama Refining* had justified many of the same statutes reviewed in *Curtiss-Wright* on the ground that they "confided to the President 'an authority which was *cognate to the conduct by him of the foreign relations of the government*.'"[64] It is hard to tell if the relevant passage in *Panama Refining* contemplated a foreign affairs exception to the nondelegation doctrine. Cutting against that reading is the Court's emphasis on the congressional "purposes and . . . conditions" in the prior foreign affairs statutes, and its more central ruling that the statute at issue, unlike the prior statutes, "declared no policy, has established no standard, has laid down no rule."[65] Whatever the Court might have meant by the term "cognate" in *Panama Refining*, the key points here are that no Supreme Court precedent prior to the 1930s supported a foreign affairs exception to the nondelegation doctrine and that *Curtiss-Wright* clearly relied on such an exception.

The foreign affairs exception to the nondelegation doctrine may have been born in *Curtiss-Wright*, but its scope there and ever since has been unclear. In his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson described *Curtiss-Wright* as holding that "the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs."[66] This formulation, and the analysis in *Curtiss-Wright*, leave many questions unanswered, including how one distinguishes between internal and external affairs, whether there are any limitations on Congress's power to delegate with respect to foreign relations, the scope and sources of the President's independent foreign relations power, and the precise manner in which the Article I and Article II powers combine to diminish delegation concerns.

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61 *Id.* at 322.

62 *See id.* at 327-29.

63 Professor Schoenbrod has suggested that *Field v. Clark*, 143 U.S. 649 (1892)—which reviewed many of the same statutes as *Curtiss-Wright*—could have been resolved on the basis of the foreign affairs exception. *See* David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1263 (1985). But the Court did not even hint at the idea there.

64 *Curtiss-Wright*, 299 U.S. at 327 (quoting Panama Refining Co. v. Ryan, 293 U.S. 388, 422 (1935)) (emphasis added).

65 *Panama Refining*, 239 U.S. at 422, 430.

66 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636 n.2 (1952) (Jackson, J., concurring).

Three Supreme Court decisions since *Curtiss-Wright* have applied some version of a foreign relations exception to the nondelegation doctrine, but they provide few answers to these questions. *Knauff v. Shaughnessy* involved a nondelegation challenge to a statute that authorized the Attorney General to exclude a non-U.S. citizen on the grounds that her admission would be contrary to the interests of the United States.[67] The Court rejected the challenge, reasoning (with a citation to *Curtiss-Wright*) that the right to exclude non-citizens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."[68] The Court did not explain the source of the President's inherent power to exclude such individuals, or how or why that power diminished delegation concerns.

In the next decision, *Zemel v. Rusk*, the plaintiff challenged the Secretary of State's denial of a passport to travel to Cuba on the ground that Congress's authorization to the Secretary to "grant and issue passports . . . under such rules as the President shall designate and prescribe" was a standardless and thus unconstitutional delegation.[69] The Court explained that because of the nature of international relations, "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."[70] It also relied on *Curtiss-Wright*'s historical gloss argument for a relaxed nondelegation standard in foreign relations.[71] The Court added that this long practice "does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice."[72] Yet despite the open-ended language of the pertinent statute, the Court concluded that the authorization was not unrestricted because its application was subject to standards laid down through long administrative practice.[73]

The final decision in this post-*Curtiss-Wright* trilogy, *Loving v. United States*, is perhaps the most illuminating.[74] There a defendant sentenced to death by a court-martial argued that a congressional authorization to the President to prescribe the procedures in court-martial cases (including the aggravating factors to be considered in death penalty cases) lacked "an intelligible principle to guide the President's discretion."[75] The Court said that this was not the right test in light of "the officer who is to exercise the

67 United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 540-41 (1950).
68 *Id.* at 542.
69 381 U.S. 1, 6, 17 (1965).
70 *Id.* at 17.
71 *Id.*
72 *Id.*
73 *Id.* at 18.
74 517 U.S. 748 (1996).
75 *Id.* at 751-52, 759.

delegated authority"—the President.[76] The right test, it explained, had to account for the fact that the President's duties as Commander in Chief gave him an independent duty to superintend the military, including courts-martial.[77] The Court then made this important statement: "The delegated duty, then, is *interlinked* with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'"[78]

As these decisions show, the foreign affairs exception is relevant even under the current nondelegation doctrine's relatively permissive approach to congressional authorizations. But it has taken on a much greater significance in the last decade as originalist Justices have proposed to make the nondelegation doctrine more robust. Any revival of the nondelegation doctrine must confront the fact that Congress in the early post-Founding period authorized the President to make broad discretionary policy determinations, and that many of the broadest delegations came in contexts related to foreign affairs. To take one notable example, a 1794 statute authorized the President, while Congress was out of session, to impose a shipping embargo "whenever, in his opinion, the public safety shall so require."[79]

Justices Thomas and Gorsuch have invoked something akin to a foreign affairs exception in suggesting how such statutes might be consistent with the original meaning of the Constitution. Justice Thomas, in his concurring opinion in *Association of American Railroads*, mentioned the 1794 embargo statute and noted that "[s]uch delegations of policy determinations pose a constitutional problem" for his strict view of Congress's exclusive power to legislate "because they effectively permit the President to define some or all of the content of that rule of conduct."[80] He addressed this problem by observing that the statute "involved the external relations of the United States," and he surmised, relying in part on *Curtiss-Wright*, that the Constitution likely "grants the President a greater measure of discretion in the realm of foreign relations."[81]

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76 *Id.* at 772.

77 *Id.*

78 *Id.* at 772-73 (quoting United States v. Mazurie, 419 U.S. 544, 556-57 (1975)) (emphasis added). The Court also added a "*[s]ee also*" citation to *Curtiss-Wright*. *Id.* at 773.

79 An Act to Authorize the President of the United States to Law, Regulate and Revoke Embargoes, ch. 41, 1 Stat. 372 (1794). For discussion of the historical context of this statute, see Nicholas R. Parrillo, *Nondelegation, Original Meaning, and Foreign Affairs: Congress's Delegation of Power to Lay Embargoes in 1794*, 172 U. PA. L. REV. 1803 (2024).

80 Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 79-80 (2015) (Thomas, J., concurring in the judgment).

81 *Id.* at 80 & n.5.

Justice Gorsuch, in his *Gundy* dissent, made a similar point. He cited *Curtiss-Wright* (among other opinions) for the proposition that "[w]hile the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch."[82] Gorsuch added that "when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'"[83] He gave as a possible example a statute that in the run-up to the War of 1812 authorized the President to extend an embargo if he determined that Great Britain or France was committing neutrality violations against U.S. commerce.[84] Gorsuch noted that this "foreign-affairs-related statute . . . may be an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II."[85]

Perhaps not surprisingly, the lower federal courts have consistently recognized a general foreign affairs exception to the nondelegation doctrine, based primarily on *Curtiss-Wright*.[86] Several scholars have also defended a foreign affairs exception to the nondelegation doctrine, generally on originalist grounds.[87] Scholars who have challenged the exception have noted that a distinction between foreign and domestic affairs for purposes of the nondelegation doctrine did not emerge until *Curtiss-Wright* in 1936, and that there were many broad statutory authorizations related to foreign affairs near the Founding, none of which were defended based on their subject matter.[88]

II. THE INDEPENDENT POWERS QUALIFICATION

This Part explains that the ostensible foreign affairs exception to the nondelegation doctrine is best understood as a qualification involving independent powers—that is, delegation concerns are reduced when

82 Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting).

83 *Id.* (quoting Schoenbrod, *supra* note 63, at 1260).

84 *See* Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 383 (1813) (quoting the statute).

85 *Gundy*, 139 S. Ct. at 2137.

86 *See, e.g.*, United States v. Henry, 888 F.3d 589, 596 (2d Cir. 2018); United States v. Kuok, 671 F.3d 931, 939 (9th Cir. 2012); United States v. Dhafr, 461 F.3d 211, 215 (2d Cir. 2006); Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1438 (9th Cir. 1996).

87 *See, e.g.*, MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 326-35 (2020); Rappaport, *supra* note 46, at 346-51; Aaron Gordon, *Nondelegation*, 12 N.Y.U. J. L. & LIBERTY 718, 782-86 (2019). The most prominent non-originalist defense can be found in Schoenbrod, *supra* note 63, at 1260-65.

88 *See, e.g.*, Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 288-89 (2021); Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1140 (2021).

Congress authorizes conduct in an area in which the recipient of the authorization has independent constitutional authority. As we explain, the President has greater independent authority over foreign affairs than over domestic affairs, which likely explains why this qualification has been thought to concern foreign affairs. But the President's foreign affairs authority is not unlimited, and presidents have some independent authority over domestic affairs. After documenting these points, we explain several ways in which an independent presidential power relating to the subject of an authorization can reduce delegation concerns.

A. *The Real Qualification: Independent Powers*

The purported foreign affairs exception to the nondelegation doctrine has been challenged on a number of grounds. One, mentioned above, is that there was no such exception recognized at the Founding or at any point before *Curtiss-Wright*. A second objection to the foreign affairs exception is that the foundational decision supporting it—*Curtiss-Wright*—relied on a theory about extraconstitutional foreign affairs authority that has been widely challenged as being inconsistent with both the written nature of the U.S. Constitution and its limited and enumerated powers structure.[89] A third objection is that a foreign affairs exception depends on a sharp line between domestic and foreign affairs that is often difficult to draw because many legal issues implicate *both* domestic and foreign affairs.[90] This objection is part of a broader challenge to "foreign affairs exceptionalism"—the idea that foreign affairs should be treated as legally distinct from domestic affairs.[91]

The best answer to these critiques, we contend, is to recognize that there is not, and never has been, a foreign affairs exception to the nondelegation doctrine, and that even *Curtiss-Wright* need not be read that way. Instead,

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89 *See, e.g.*, Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, 83 YALE L.J. 1, 29-30 (1973); Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright*?*, 13 YALE J. INT'L L. 5, 13-14 (1988); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 379-81 (2000). The sovereign power idea has had its share of supporters, though, and it has had more influence in U.S. constitutional law than is commonly appreciated. *See generally* CURTIS A. BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS: CONSTITUTIONAL AUTHORITY IN PRACTICE ch. 2 (forthcoming 2024).

90 Delegations of authority concerning tariffs, for example, concern both foreign trade and the protection of domestic producers, and yet presidents have long been granted substantial discretion over tariffs. Delegations of emergency authority, which are also often framed in broad terms, can relate to events abroad, to events at home, or both (the COVID pandemic, for example). Delegations of immigration-related authority, such as the authority to exclude non-U.S. citizens on national security grounds, can similarly be seen as involving a mix of domestic and foreign affairs.

91 *See generally* Ganesh Sitaraman & Ingrid Brunk Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015).

there has been a qualification to the nondelegation doctrine for situations *in which the recipient of a congressional authorization has independent constitutional authority relating to the subject of the authorization*.[92] As we discuss in the next Section, the President has significant independent authority relating to foreign affairs, which may have caused observers to describe this as a foreign affairs qualification. But that is an imprecise and potentially misleading characterization.

That there is a qualification for independent authority rather than foreign affairs authority becomes apparent when it is recalled that many broad delegations are made *to the judiciary*, including in cases that do not involve foreign affairs.[93] In fact, the earliest Supreme Court decision rejecting a nondelegation challenge—*Wayman v. Southard*—involved a congressional authorization to the judiciary, not the executive.[94] In upholding a congressional authorization to the judiciary to prescribe rules for execution of judgments, the Court noted that "[a] general superintendence over this subject seems to be properly within the judicial province, and has been always so considered."[95] In other words, the authorization was constitutional in part because it related to an area in which the judiciary already had independent constitutional authority.

Although buried within other reasoning, the Court in *Curtiss-Wright* similarly hinted at this independent powers idea. It explained that it was "dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . ."[96] As we note in the next Section, the Court's "sole organ" characterization of executive power is overstated, but the central point is that the Court was treating the congressional authorization as less problematic because it was connected with the President's independent constitutional authority. This is also the best way to understand what the Court was getting at in *Panama Refining* in referring to the early foreign affairs statutes as delegating authority that was "cognate" to the President's conduct of foreign relations.[97]

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92 For a lucid recognition of this point, see Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1394 (2017) (referring to this proposition as the "Inherent-Powers Corollary" to the nondelegation doctrine).

93 *See id.* at 1408-25.

94 23 U.S. (10 Wheat.) 1 (1825).

95 *Id.* at 45.

96 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-20 (1936).

97 Volokh, *supra* note 92, at 1398-1400 (quoting Panama Refining Co. v. Ryan, 293 U.S. 388, 422 (1935)).

The Court more clearly relied on the independent powers idea in its 1975 decision in *United States v. Mazurie*,[98] a case that (like *Wayman*) did not involve presidential power. The issue in *Mazurie* was whether it was constitutional for Congress to authorize an Indian tribe to regulate the sale of alcohol by non-Indians operating on private land within a reservation.[99] In holding that it was, the Court emphasized that Indian tribes "possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life," including "the distribution and use of intoxicants."[100] Citing *Curtiss-Wright*, the Court explained that nondelegation limitations are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter."[101] Importantly, the Court made clear that it "need not decide" whether the tribe could have passed the regulation in question absent the statutory authorization.[102] Rather, said the Court, it was "necessary only to state that the independent tribal authority is quite sufficient to protect Congress's decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes.'"[103]

This is also what the Supreme Court suggested in its 1996 decision in *Loving*.[104] As discussed in Section I.B, the issue there was whether it was constitutional for Congress to have authorized the President to prescribe the aggravating factors to be considered by military courts-martial in deciding whether to impose the death penalty.[105] The Court concluded that this delegation was constitutional because it was "interlinked with duties already assigned to the President by express terms of the Constitution."[106] This does not mean, the Court made clear, that the President had to have independent power as Commander in Chief to prescribe aggravating factors in capital cases.[107] Rather, it was enough that "[t]he President's duties as Commander in Chief . . . require him to take responsible and continuing action to

98 419 U.S. 544 (1975).

99 *Id.* at 546.

100 *Id.* at 557.

101 *Id.* at 556-57.

102 *Id.* at 557.

103 *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3). For an argument that federal–state cooperative programs should not be viewed for nondelegation purposes like delegations to federal agencies because the states have their own independent power to bring to the table, see Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 YALE L.J. 1320, 1380 (2023).

104 517 U.S. 748 (1996).

105 *Id.* at 751-52.

106 *Id.* at 772.

107 *Id.* at 773.

superintend the military, including the courts-martial."[108] The Court cited to both *Mazurie* and *Curtiss-Wright*.

In sum, both descriptively and as a matter of doctrinal coherence and constitutional structure, there is no foreign affairs exception to the nondelegation doctrine. Rather, there is a qualification for situations in which the recipient of a congressional authorization has independent authority relating to the subject of the authorization.

B. *Overview of Independent Presidential Power*

In the context of delegations to the President, the independent powers qualification to the nondelegation doctrine requires identifying the President's independent powers. An independent power is one that the President can exercise on his or her own constitutional authority.[109] Most of the literature on the nondelegation doctrine says very little about the nature of this independent authority, and some scholars advocating a foreign affairs exception to the doctrine appear to assume that the President has plenary power over foreign affairs,[110] which (as we discuss below) is not the case.

Identifying independent presidential power is not a simple task. What Justice Jackson wrote in *Youngstown* remains largely true today: there is a "poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."[111] The difficulty is exacerbated, as the opinions in *Youngstown* reflect, by methodological contestation over the proper interpretive lens for identifying executive power.[112] Many issues of presidential power, moreover, have not

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108 *Id.* at 772.

109 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers . . . ."). Some independent presidential powers are concurrent with Congress's power in the sense that both branches can act on the same matter. *Id.* (noting that the President and Congress "may have concurrent authority"). The President's independent power is exclusive only when Congress cannot "act[] upon the subject." *Id.* at 638. For example, in *Zivotofsky*, the Court held that the President has independent power to recognize foreign governments and that that power is exclusive in the sense that Congress cannot by statute recognize foreign governments. *See* Zivotofsky v. Kerry, 576 U.S. 1, 13-15 (2015).

110 *See, e.g.*, Schoenbrod, *supra* note 63, at 1265 (suggesting that there is no improper delegation "[w]here the Constitution gives the Executive independent powers in article II, *as it does over war and foreign affairs* . . . .") (emphasis added).

111 *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring); *see also* Michael Coenen & Scott M. Sullivan, *The Elusive Zone of Twilight*, 62 B.C. L. REV. 741, 744 (2021) ("Neither Justice Jackson's concurrence itself nor subsequent Supreme Court applications of the *Youngstown* framework have thus provided much guidance as to how courts should decide Category-Two cases.").

112 For example, Justice Black's majority opinion was notably formalist, *see Youngstown*, 343 U.S. at 585-89; Justice Jackson's concurrence was notably functionalist, *see id.* at 635-39 (Jackson, J., concurring); and Justice Frankfurter's opinion notably embraced settled historical practice as a gloss

been definitively resolved by the Supreme Court. When the Court has addressed these issues, it has typically grounded its recognition of independent presidential powers on some combination of the text of Article II, structural inferences, and historical practice.[113] Because the Court often does not explain the precise basis for independent powers, and because its decisions on independent powers are sporadic, the proper scope of these powers beyond the facts and holdings of particular decisions is often contested.

It is not our goal in this Section to offer anything like a comprehensive account of independent presidential authority. Instead, we make three general points.

First, the Constitution does not identify any general "foreign affairs power." Instead, it sets forth discrete foreign affairs powers, some of which are implied from other powers, and some but not all of which can be exercised by the President independently—that is, without congressional authorization.[114] Although the precise scope of the President's independent foreign affairs authority is contested, it is clear that the President often cannot act alone.[115] For example, providing monetary aid to other governments

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on constitutional meaning, *see id.* at 610-11 (Frankfurter, J., concurring). In addition, Justice Jackson alluded (critically) to what we would today call originalism when he said, "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." *Id.* at 634 (Jackson, J., concurring).

113 *See, e.g.*, *Zivotofsky*, 576 U.S. at 11-28; *Loving*, 517 U.S. at 758-74.

114 The Supreme Court has sometimes talked loosely about presidential power "over foreign affairs" or "over national security." But it has not in practice given effect to such open-ended authority, and, indeed, it specifically rejected the idea in *Zivotofsky*. 576 U.S. at 21-22. Even in its broadest decisions upholding presidential power over foreign affairs, it has simply reasoned that "in foreign affairs the President has *a degree* of independent authority to act." Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (emphasis added). Some scholars (and Justice Thomas on the Supreme Court) contend that the Article II Vesting Clause implicitly conveys to the President foreign affairs powers not given to Congress. *See, e.g.*, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234, 252-61 (2001); *Zivotofsky*, 576 U.S. at 37-38 (Thomas, J., concurring in the judgment and dissenting in part). This claim is heavily contested in scholarship and has not been embraced by the Court. *See, e.g.*, Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (expressing skepticism); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019) (same). In any event, even that claim does not contend that the President has unlimited foreign affairs authority.

115 *See Zivotofsky*, 576 U.S. at 16 ("[M]any decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action"). Some originalist scholars have interpreted the general reference to "executive Power" in Article II as including the ability to receive certain statutory delegations of discretion, including discretion relating to foreign affairs. *See, e.g.*, Rappaport, *supra* note 46, at 347-53; *see also* MCCONNELL, supra note 87, at 334-35 (arguing that delegations are permissible when they correspond with what were traditionally Crown prerogatives, including prerogatives relating to foreign affairs). We do not attempt to assess that claim here, but we note that this reading of Article

relates to the conduct of foreign affairs, but it is uncontroversial that the President needs a congressional appropriation in order to take this action.[116] Similarly, extraditing criminal suspects to other countries concerns foreign affairs, but it is settled that presidents need authorization in a treaty or statute in order to extradite.[117] Making a binding international agreement is a foreign affairs power, but the Constitution at least sometimes requires the President to obtain senatorial or congressional approval.[118] And initiating a full-scale war is a foreign affairs power, but, because of the Article I Declare War Clause and other provisions, many observers have concluded that it is not a power that the President can independently exercise.[119]

Second, it is generally agreed that presidents have some independent powers relating to national defense, command over the military, diplomacy, recognition of foreign governments, and the settlement of claims. It has long been accepted, for example, that as Commander in Chief, the President has the power to repel attacks on the United States.[120] The Supreme Court confirmed this proposition in the Civil War-era decision *The Prize Cases*.[121] Based on an uncertain combination of the Commander in Chief Clause, the Take Care Clause, and the Article II Vesting Clause, the Court observed (in dicta) that "[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force."[122] Although less

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II is not obvious from the constitutional text or structure, and we are not aware of any direct support for it in debates over delegation in the early post-Founding period. *Cf.* Mortenson & Bagley, *supra* note 46, at 363-64 (contending that early post-Founding debates over delegation are inconsistent with the claim); Michael D. Ramsey & Matthew C. Waxman, *Delegating War Powers*, 96 S. CAL. L. REV. 741, 754 (2023) (observing that it "seems far from certain" that the Founding generation had this idea in mind). It is also worth noting that this claim is not limited to foreign affairs delegations. *See* Note, *supra* note 88, at 1158 (noting that, on Rappaport's view, appropriation laws escape delegation concerns).

116 *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"); CURTIS A. BRADLEY, ASHLEY S. DEEKS & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 152 (8th ed. 2024).

117 *See* Valentine v. United States, 299 U.S. 5, 8 (1936) ("[A]lbeit a national power, [extradition] is not confided to the Executive in the absence of treaty or legislative provision.").

118 *See* Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629, 641-42 (2020).

119 Even the executive branch, through the Office of Legal Counsel, has sometimes acknowledged that congressional authorization is needed for starting a full-scale war. *See, e.g.*, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C., 2018 WL 2760027, at *4 (May 31, 2018).

120 *See, e.g.*, LOUIS FISHER, PRESIDENTIAL WAR POWER 8 (3d ed. rev. 2013). There is some indication that the Founders expressly contemplated such a presidential power when crafting the Declare War Clause. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed., 1911) ("Mr. Madison and Mr. Gerry moved to insert '*declare*,' striking out '*make*' war; leaving to the Executive the power to repel sudden attacks.").

121 67 U.S. 635 (1862).

122 *Id.* at 668.

well settled, the President's defensive war powers include, under some accounts, the authority to use force to protect and rescue U.S. citizens abroad, and presidents have often exercised such authority.[123]

It is also settled that the President has some independent authority relating to diplomacy. The President has from the beginning communicated with foreign nations, negotiated treaties and other types of agreements, announced U.S. foreign policy positions and initiatives, and stated the U.S. interpretation of rules of customary international law. Because of these powers, the Supreme Court has sometimes gone so far as to describe the President as the "sole organ" of the United States in its conduct of foreign affairs.[124] While suggesting that this description is an overstatement, the Court in *Zivotofsky v. Kerry* acknowledged that the President has the power to "open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers," to "negotiate treaties," and to "dispatch[] . . . diplomatic agents," and additionally has a "unique role in communicating with foreign governments."[125]

Relatedly, it is accepted that presidents have the authority to determine which governments and territories are recognized by the United States. As early as 1793, during France's revolution, U.S. presidents had to make recognition determinations in the course of ascertaining whether to receive particular ambassadors, negotiate treaties with particular governments, and the like.[126] The Supreme Court has long acknowledged this power, and in *Zivotofsky* it not only confirmed the power but also held that it was exclusive.[127] The Court explained that the power finds "support, although not . . . sole authority," in the President's Article II duty to "receive Ambassadors and other public Ministers."[128] The Court also cited a long practice of presidents recognizing foreign nations and governments.[129]

The Supreme Court has also long accepted a presidential power to settle U.S. nationals' claims against foreign governments by means of executive

123 *See* BARBARA SALAZAR TORREON & SOFIA PLAGAKIS, CONG. RSCH. SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2023 (2023) (listing hundreds of instances of U.S. uses of armed force, many of which involved protecting U.S. citizens and property abroad). For Justice Department opinions in support of this practice, see, for example, *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980); Training of British Flying Students in the United States, 40 Op. Att'ys Gen. 58, 62 (1941).

124 *See, e.g.*, United States v. Belmont, 301 U.S. 324, 330 (1937); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

125 Zivotofsky v. Kerry, 576 U.S. 1, 13-14, 21 (2015).

126 BRADLEY, DEEKS & GOLDSMITH, *supra* note 116, at 18-19.

127 *Id.* at 28; *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive.").

128 *Zivotofsky*, 576 U.S. at 11, 13 (quoting U.S. CONST. art. II, § 3).

129 *Id.* at 17-19.

agreements.[130] The primary basis for this power has been the long historical practice of presidents settling claims for the United States, which dates back to George Washington's administration, combined with "a history of congressional acquiescence" that is "treated as a 'gloss on Executive Power vested in the President by § 1 of Art. II.'"[131] The Court has also referred to the structural role of the President as the United States' diplomatic organ, a role that is implied from the unitary nature of the executive branch and various presidential powers, such as over treaty negotiation.

The power to settle claims by executive agreement is one instance of a broader independent presidential authority to make "sole executive agreements"—that is, binding international agreements without authorization or approval from Congress or the Senate.[132] The Court has not been precise about the scope of this power. Most commentators agree, based on plausible inferences from the Court's decisions, that the President has authority at least to make sole executive agreements that are tied to an independent power and supported by long historical practice and congressional acquiescence.[133] Other prominent examples of sole executive agreements that are related to independent presidential power are ones made pursuant to the Commander in Chief Clause (such as for an exchange of prisoners of war or an armistice) and in connection with the President's recognition power.[134]

Third, presidents also have some independent powers relating to *domestic* affairs. These powers include, for example, the powers to veto legislation,

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130 *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003); Dames & Moore v. Regan, 453 U.S. 654, 682 (1981); United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937). Even the dissenters in *Garamendi* accepted that there was this authority. *See Garamendi*, 539 U.S. at 436 (Ginsburg, J., dissenting).

131 Medellín v. Texas, 552 U.S. 491, 531 (2008) (quoting *Dames & Moore*, 453 U.S. at 686) (quotation marks omitted); *see also Garamendi*, 539 U.S. at 415 ("[Since] the practice goes back over 200 years, and has received congressional acquiescence throughout its history, the conclusion '[t]hat the President's control of foreign relations includes the settlement of claims is indisputable.'" (quoting *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring))).

132 *See Garamendi*, 539 U.S. at 415 (recognizing a general presidential power "to make [sole] 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress," based on a similar logic of presidential practice and congressional acquiescence).

133 For discussion, see Hathaway, Bradley & Goldsmith, *supra* note 5, at 640.

134 On the Commander in Chief Clause, see RESTATEMENT (SECOND) FOREIGN RELS. L. U.S. § 121 cmt. b (AM. L. INST. 1965) ("A large proportion of the international agreements made under the powers of the President and intended to create legal relationships under international law have been based on his power as commander-in-chief and have provided for the conduct of military operations with allies of the United States."). On recognition, see *Pink*, 315 U.S. at 222-23 (effectuating President Franklin Roosevelt's independent power to recognize the Soviet Union and to settle claims with that country), and *Belmont*, 301 U.S. at 330-31 (same). On presidential power relating to armistices, see Avery C. Rasmussen & Saikrishna Bangalore Prakash, *The Peace Powers: How to End a War*, 170 U. PA. L. REV. 717, 744-52 (2022).

issue pardons, make recess appointments, and remove executive officials.[135] The independent powers potentially most salient for nondelegation purposes flow from the Take Care Clause, which provides that the President "shall take Care that the Laws be faithfully executed."[136]

Three independent presidential powers stemming primarily from the Take Care Clause are potentially relevant in the nondelegation context. The first is the so-called "protective power." This power is, as Professor Henry Monaghan has discussed, "an executive power to preserve, protect, and defend the personnel, property, and instrumentalities of the national government."[137] Although the scope of this power is contested, the executive branch has often in U.S. history invoked the protective power to use federal executive branch military and civilian officials to redress matters ranging from interference in the mail and other federal functions to slave rebellions, labor strikes, and domestic disturbances that threaten federal governmental property and operations.[138]

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135 *See* U.S. CONST. art. I, § 7 (veto power); U.S. CONST. art. II, § 2 (pardon power); *id.* (recess appointments power); Myers v. United States, 272 U.S. 52, 117 (1926) (removal power).

136 U.S. CONST. art. II, § 3.

137 Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 61-63 (1993). Monaghan relies primarily on two decisions in support of this proposition. The first is *In re Neagle*, 135 U.S. 1 (1890). There, in the course of ruling that a U.S. Marshal was authorized to use lethal force to protect a Supreme Court Justice despite the absence of statutory authorization, the Court stated that the Take Care Clause "enable[s] [the President] to fulfill the duty of his great department," and implied that the duty was not "limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*," but rather includes "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." *Id.* at 64. Another decision Monaghan invokes is *In re Debs*, 158 U.S. 564 (1895). There, the Court upheld the Attorney General's authority, without congressional authorization, to seek an injunction to stop the Pullman strike of 1894, in part on the ground that "[t]he entire strength of the nation may be used" to stop the strike's obstruction of national commerce, which meant that the President was free to use the lesser means of preventing the injury "by peaceful process." *Id.* at 582-83. Monaghan, however, critiques the Court's application of the protective power idea to the situation in *Debs*. *See* Monaghan, *supra*, at 65.

138 For executive branch reliance on the protective power, see, for example, Authority to Use Troops to Prevent Interference with Federal Employees by Mayday Demonstrations and Consequent Impairment of Government Functions, 1 Supp. Op. O.L.C. 343 (1971) (affirming the President's "inherent constitutional authority to use federal troops" to ensure federal employees can access their posts); Memorandum from Off. of Legal Couns. to the Gen. Couns., Dep't of Army, Use of Federal Troops to Protect Government Property Against Anti-War Demonstrators (Oct. 4, 1967), https://harvardnsj.org/2024/02/08/use-of-federal-troops-to-protect-government-property-and-functions-at-the-pentagon-against-anti-war-demonstrators-oct-4-1967 [https://perma.cc/E7WN-3K5P] (outlining the legal grounds for using federal troops to protect federal government property from interference by anti-war protestors). For a comprehensive overview of how the executive branch has invoked and justified the protective power in the domestic realm, and a critique, see Christopher Mirasola, *Sovereignty, Article II, and the Military During Domestic Unrest*, 15 HARV. NAT'L SEC. J. 199 (2023).

The second power that derives from the Take Care Clause is the President's discretionary authority to "prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of congressional authorization to complete that scheme."[139] This power is consistent with even a revived nondelegation doctrine's acceptance that actors outside of Congress can to some degree to "fill up the details" of federal legislation.[140] A third and related presidential power concerns the settled tradition of prosecutorial and civil enforcement discretion.[141]

C. *How Independent Power Relates to Delegation*

Recognizing that there is an independent powers qualification to the nondelegation doctrine does not tell us how this qualification actually works. Even a reinvigorated nondelegation doctrine, at least as articulated by Justice Gorsuch (in an opinion joined by Chief Justice Roberts and Justice Thomas), would permit statutory authorizations that allow the executive branch to fill in the details of Congress's policy prescriptions or that tie policy choices to particular factual determinations made by the President.[142] Beyond these contexts, the operation of the independent powers qualification depends in part on the nature of the independent power in question.

We contend that the existence of independent presidential power can affect the nondelegation doctrine in at least three ways. The first can be called

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139 Jack Goldsmith & John Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006). This presidential power rests on the idea that no statute can specify in advance every instance of its application or implementation, and that the President's enforcement authority gives him incidental power to fill in the details. *See, e.g.*, United States v. MacDaniel, 32 U.S. 1, 14-15 (1833); Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("[N]o statute can be entirely precise, and . . . some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it . . . .").

140 *See* Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) ("[A]s long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'"); Wayman v. Southard, 23 U.S. 1, 43 (1825) ("The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details.").

141 *See* United States v. Texas, 143 S. Ct. 1964, 1971 (2023) (noting in the civil context that "[u]nder Article II, the executive branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law'") (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021)); United States v. Armstrong, 517 U.S. 456, 464 (1996) (explaining that federal prosecutors have broad prosecutorial discretion "because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'"); United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.").

142 *See supra* text accompanying note 42 (discussing *Gundy*, 139 S. Ct. at 2136-37 (Gorsuch, J., dissenting)).

redundant authorizations—where Congress purports to authorize the President to do something that the President has independent authority to do. This situation presents no nondelegation issue because the President could take the same action without the authorization.[143] If Congress authorizes the President to use force to repel an attack, for example, the authorization is likely redundant in light of the President's independent defensive war authority. Some aspects of the 9/11 Authorization for Use of Military Force (AUMF) likely have this feature, given that the President presumably had some independent authority to take defensive military action against the perpetrators of the attack. Indeed, the preamble to the AUMF specifically states that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."[144]

Importantly, the relevance of independent presidential power extends beyond mere situations of redundancy.[145] The second way in which such power reduces delegation concerns involves what could be called *unlocking* authorizations—where congressional action unlocks the President's independent authority to take actions. The best example, which we discuss in Section III.A, concerns the President's authority as Commander in Chief: a declaration of war unlocks broad Commander in Chief powers related to the conduct of the war that the President could not otherwise execute. Because these powers are independent, their exercise (once unlocked) does not present a delegation problem. In that situation, there is no transfer of legislative authority from Congress to the President.

The third and most subtle way in which independent power reduces delegation concerns relates to the policy determination at issue in the delegation. In what we call *independent discretion* authorizations, Congress authorizes the President to take actions that he could not otherwise take, but that are premised or conditioned on a determination or exercise of power that the President is empowered to make when exercising his or her independent authority. A core concern underlying the nondelegation doctrine, as we discussed in Section I.A, is that Congress should not be able to transfer important policy determinations to other actors. But when presidents have

143 *See* Schoenbrod, *supra* note 63, at 1260 ("Legislation that leaves the Executive Branch with discretion does not delegate legislative power where the discretion is to be exercised over matters already within the scope of executive power.").

144 Pub. L. No. 107-40, 115 Stat. 224 (2001).

145 Professor Volokh recognizes this feature in the case law, which he refers to as the "interlinking extension" of independent presidential power, but he criticizes it, contending that "[e]ither a delegate can act on his own, or he can't." Volokh, *supra* note 92, at 1407. For reasons given in the text, we think this conclusion is too simplistic. But we agree that merely referring to an interlinking of power without more is unsatisfactory.

independent authority to make the determination as part of the exercise of their own powers, this concern diminishes. As the Court in *Loving* noted, "[h]ad the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, [the] argument that Congress failed to provide guiding principles to the President might have more weight."[146]

To illustrate this third linkage, imagine that Congress, in a variation on the facts of *Curtiss-Wright*, had criminalized the sale of arms "if the President determines that the United States should remain neutral in the conflict." This would amount to an independent discretion authorization. Congress's authorization would not be redundant: the President cannot criminalize conduct on his or her own.[147] Nor would it merely unlock authority that the Constitution assigns to the President; again, the President does not have independent criminalization authority. So, for example, if Congress merely passed a statute declaring neutrality, that by itself would not have unlocked any criminalization authority in the President. As a matter of established practice, however, the President would have the authority to decide the underlying policy question in exercising his or her own powers: whether the United States should remain neutral. At least since George Washington's 1793 Neutrality Proclamation, it has been accepted that presidents have the authority to decide whether the United States should be neutral, at least absent a congressional directive to the contrary.[148] The delegation we are hypothesizing would thus combine Congress's criminal lawmaking power with the President's independent authority to make the neutrality determination. The actual facts of *Curtiss-Wright*, it should be noted, are more complicated than this hypothetical; we return to the case in the next Part.

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146 517 U.S. at 772; *see also, e.g.*, Doe v. Bush, 323 F.3d 133, 143 (1st Cir. 2003) (concluding that Congress's 2002 authorization of force against Iraq did not violate the nondelegation doctrine, in part because "[w]ar powers, in contrast to '*all* legislative power,' are shared between the political branches"); *cf.* Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 793 (2022) ("[T]he President may have power as commander in chief to provide for disciplining the armed forces in the absence of contrary legislation from Congress.").

147 George Washington's 1793 Neutrality Proclamation purported to make it a crime for U.S. citizens to provide certain assistance to the warring powers, based on application of the law of nations as part of U.S. common law, but the Supreme Court eventually held that there is no federal common law of crimes. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").

148 In 1914, for example, President Wilson declared U.S. neutrality with respect to World War I. *See* Woodrow Wilson, President, Message on Neutrality (Aug. 19, 1914), *in* AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/message-neutrality [https://perma.cc/9HDB-Z4Y3].

Before considering additional illustrations, we pause to make two points that apply generally when nondelegation challenges are brought against statutory authorizations related to independent presidential power.

The first point concerns a type of deference that the Court appears to have adopted when assessing such claims. As noted earlier, the scope of the President's authority under the second category of Justice Jackson's framework from *Youngstown*—the so-called "zone of twilight"—is notoriously uncertain. This means that it is not always clear whether the President has sufficient independent authority to take a particular action authorized by Congress or to make a relevant policy determination. In these situations—when Congress is authorizing in an area of undoubted independent presidential power, but it is unclear whether the scope of that power suffices to relieve delegation concerns—the Court typically upholds the statute in order to avoid unnecessary and difficult rulings about the scope of presidential power, the consequences of which could extend far beyond the delegation context.

In *Loving*, for example, the Court said that it "need not decide whether the President would have inherent power as Commander in Chief to prescribe aggravating factors in capital cases." It was enough that Congress was authorizing action *in an area* in which the President had independent authority (superintending the military), the precise scope of which was uncertain.[149] This judicial diffidence about determining the exact boundaries of independent authority is also consistent with Chief Justice Marshall's admonition in *Wayman*—a case involving a statutory authorization related to an independent *judicial* power that emphasized the importance of that power to the delegation question—that "the precise boundary of [Congress's power to delegate] is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."[150]

This form of deference is important to all three linkages described above because it accounts for and accommodates the frequent uncertainty at the margins about the scope of independent presidential power. It also helps explain why Congress might enact redundant authorizations, since Congress, like the courts, can be uncertain about the scope of presidential power. And

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149 517 U.S. at 773.

150 Wayman v. Southard, 23 U.S. 1, 46 (1825). It is important to note, relatedly, that as the political question doctrine and other doctrines make clear, not all constitutional limitations are judicially enforceable. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019) (relying on the political question doctrine in declining to resolve the constitutionality of partisan gerrymandering); Nixon v. United States, 506 U.S. 224, 226 (1993) (relying on the political question doctrine in declining to adjudicate a challenge to an impeachment procedure used by the Senate); *see also* Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031, 1082 (2023) ("[T]he functions served by the political question doctrine are in many ways standard features of American law.").

it clarifies why courts have tended to uphold authorizations in the unlocking and especially independent discretion contexts when the independent presidential power in question was closely related to ("in an area"), but did not unambiguously cover, the authorized task or decision.

The second general point is that in assessing nondelegation challenges to statutory authorizations related to independent presidential powers, we are for the most part bracketing a different type of constitutional argument that would separately provide support for such authorizations—the practices of government institutions that constitute "historical gloss."[151] The Supreme Court has given weight to gloss in its separation of powers decisions, especially when the practice is longstanding and bipartisan and both of the political branches appear to have accepted it.[152] Of special relevance here, the Court has (as Parts I and II showed) often relied on gloss both in identifying the President's independent powers under Article II and in rejecting constitutional nondelegation challenges.

The arguments for considering gloss, including those relating to institutional reliance and judicial competence, are especially strong with respect to applications of the nondelegation doctrine—a separation of powers limitation that is not expressly mandated by the constitutional text, has an uncertain and difficult-to-apply scope, and implicates the practices of the coordinate branches of government dating back to the Founding.[153] While these arguments are not the focus of this Article, the general point to keep in mind is that in the instances in which independent presidential power considered alone might not support statutory authorizations that would otherwise violate a revived nondelegation doctrine, arguments based on historical practice remain independently available. Such arguments would turn not on foreign affairs as a category but rather on the specific history of particular types of delegations.

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151 For discussion of the nature and relevance of historical gloss, see generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

152 *See e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 23 (2015); NLRB v. Noel Canning, 573 U.S. 513, 524 (2014); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); United States v. Midwest Oil Co., 236 U.S. 459, 473 (1915).

153 *See* BRADLEY, *supra* note 89, at ch. 8. Even interpreters who are skeptical of relying on historical gloss may give weight to practices that date back to near the Founding, either on the theory that those practices are likely to reflect original constitutional understandings or that they constitute an early "liquidation" of constitutional meaning. *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 42-43 (2020). For critiques of gloss-based reasoning in constitutional interpretation, see, for example, Mary L. Dudziak, *The Gloss of War*, 122 MICH. L. REV. 149 (2023); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023); Stephen M. Griffin, *Against Historical Practice: Facing Up to the Challenge of Informal Constitutional Change*, 35 CONST. COMMENT. 79 (2020); and Saikrishna Bangalore Prakash, *Against Constitution by Convention*, 108 CALIF. L. REV. 1975 (2020).

III. THE INDEPENDENT POWERS QUALIFICATION IN OPERATION

In this Part, we consider various examples of broad authorizations of power to the executive branch, most but not all of which relate to foreign affairs. Applying the framework that we have just outlined, we assess whether and to what extent these authorizations benefit from an independent powers qualification. As we explain, the qualification is often helpful in justifying broad congressional authorizations to the President. But this is not so in every instance. Some important examples of broad congressional authorizations in areas related to foreign affairs cannot easily be justified by reference to an independent powers qualification.

A. *Using Military Force*

The Constitution assigns to Congress the power to declare war, as well as a variety of other war-related powers. Although the United States has used military force in hundreds of situations, Congress has formally declared war in only five conflicts: the War of 1812, the Mexican–American War, the Spanish–American War, World War I, and World War II.[154] In each declared war, Congress separately authorized the President in broad terms to use the land and naval forces.[155] Despite their breadth, these authorizations have never been thought to raise delegation concerns, presumably because it is assumed that, once Congress both declares war and broadly authorizes force, the President's Commander in Chief powers are fully engaged and allow him or her to direct the armed forces provided by Congress to prosecute the war.[156] In other words, a declaration of war is viewed (at least if it is combined with a general authorization of force) as *unlocking* a broad set of independent Commander in Chief powers that are informed by historical practice and the

154 Although typically described as a declared war, Congress in the Mexican–American War did not say that it was declaring war. Rather, it simply said that "a state of war exists" between Mexico and the United States. H.R. 145, 29th Cong. (1846).

155 *See* JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS, at app. A (2014); Bradley & Goldsmith, *supra* note 4, at 2062-66.

156 *See, e.g.*, Ramsey & Waxman, *supra* note 115, at 756 ("Congress's recognition of broad presidential discretion signaled Congress's decision not to direct or limit the President's exercise of the commander-in-chief power in conducting the hostilities.").

laws of war.[157] Since Congress is not delegating those Article II powers, there is no issue of improper delegation.[158]

Importantly, it is also generally accepted that Congress can unlock the President's Commander in Chief authority without formally declaring war.[159] Even at the Founding, wars were often conducted without formal declarations,[160] and the United States' first war against a foreign power—the Quasi-War against France in the 1790s—was fought without such a declaration. Similarly, Congress in the early nineteenth century broadly authorized the use of force against the Barbary pirates without formally declaring war.[161] Today, congressional authorizations in lieu of formal declarations of war are the norm, in part because declarations of war no longer serve the purposes that they once served under international law.[162] Congress has not formally declared war since 1942, and in some of the most substantial post-World War II conflicts—the Vietnam War, the 1991 and 2003 wars in Iraq, and the post-9/11 war in Afghanistan—Congress has broadly authorized military action without such a declaration.[163] These authorizations go through the same bicameral process as a formal declaration of war, and they have

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157 *See, e.g.*, Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."); *see also* Bradley & Goldsmith, *supra* note 4, at 2091-92 & nn.189-98 (discussing how the laws of war inform the interpretation of congressional authorizations of force).

158 *See also* Schoenbrod, *supra* note 63, at 1261 ("The President's discretion in the conduct of the war is not a delegation because the President is not exercising legislative power; the President is not making law but making war.").

159 *See* Bradley & Goldsmith, *supra* note 4, at 2059-60.

160 *See generally* J.F. MAURICE, HOSTILITIES WITHOUT DECLARATION OF WAR: AN HISTORICAL ABSTRACT OF THE CASES IN WHICH HOSTILITIES HAVE OCCURRED BETWEEN CIVILIZED POWERS PRIOR TO DECLARATION OR WARNING: FROM 1700 TO 1870 (1883); THE FEDERALIST NO. 25 (Alexander Hamilton) ("[T]he ceremony of a formal denunciation of war has of late fallen into disuse.").

161 In an 1802 statute, Congress authorized the President to seize vessels belonging to the Bey of Tripoli and his subjects "and also to cause to be done all such other acts of precaution or hostility as the state of war will justify, *and may, in his opinion, require*." An Act for the Protection of the Commerce and Seamen of the United States, Against the Tripolitan Cruisers, ch. 4, 2 Stat. 129 (1802) (emphasis added). Congress issued a similarly worded authorization in 1815 with respect to Algiers. *See* An Act for the Protection of the Commerce of the United States Against the Algerine Cruisers, ch. 90, 3 Stat. 230 (1815).

162 *See, e.g.*, Paul Kahn, *War Powers and the Millennium*, 34 LOY. L.A. L. REV. 11, 51 (2000). At the Founding, "[a] declaration of war was a method by which states could trigger the full array of international law rules governing neutral and belligerent states on issues such as rights to seizure of vessels, shipment of contraband, and institution of blockades, as well as domestic laws related to war and emergency powers." Bradley & Goldsmith, *supra* note 4, at 2059. Most of the international law effects have been overtaken by the UN Charter regime governing the use of force, and most of the domestic effects are no longer tied exclusively to declared wars (although a few still are). *Id.* at 2061-62.

163 Bradley & Goldsmith, *supra* note 4, at 2060.

always been viewed as unlocking the President's Commander in Chief authority within the terms of the authorization. The Supreme Court's plurality opinion in *Hamdi v. Rumsfeld* suggested as much when interpreting the post-9/11 authorization of force.[164]

The above discussion is not meant to suggest that a use-of-force authorization could never raise delegation concerns. The most significant such concerns would arise if Congress broadly authorized the use of force without expressly or implicitly identifying the enemy or the context in which force was to be used. In such situations, the authorization could be seen as delegating the unlocking decision itself, which Congress alone possesses, to the President. Indeed, this objection has surfaced from time to time. In the 1850s, President Buchanan made numerous requests for legislation permitting him to use military force at his discretion in Mexico and Central America to protect U.S. citizens and their property, all of which Congress rejected.[165] Some of the opposition to these requests reflected delegation concerns. For example, Senator Seward (who would go on to serve as President Lincoln's Secretary of State) objected that nothing would "be more strange and preposterous than the idea of the President of the United States making hypothetical wars, conditional wars, without any designation of the nation against which war is to be declared . . . ."[166]

Some commentators have argued that some twentieth-century statutes relating to the use of force implicate delegation concerns. A 1957 joint resolution, which is still in effect, provides that "if the President determines the necessity thereof, the United States is prepared to use armed forces to assist" any Middle Eastern nation or group of nations "against armed aggression from any country controlled by international communism . . . ."[167] Several members of Congress objected that this resolution's failure to specify any conditions on the use of force constituted an unconstitutional delegation of Congress's war powers.[168] Commentators expressed similar concerns with

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164 *See* 542 U.S. 507, 518 (2004) (plurality opinion by O'Connor, J.) (construing the 9/11 authorization of force as implicitly conveying to the President the traditional "incident[s] of war," including the authority to detain enemy combatants). The lower courts during the Vietnam War held that Congress could broadly authorize the Commander in Chief to use force without issuing a declaration of war. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973).

165 *See* HENRY BARTHOLOMEW COX, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER, 1829-1901, at 195-99 (1984); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861, at 127-30 (2005).

166 CONG. GLOBE, 35th Cong., 2d Sess. 1120 (1859).

167 Joint Resolution to Promote Peace and Stability in the Middle East, Pub. L. 85-7, 71 Stat. 5 (1957); *see also* Ramsey & Waxman, *supra* note 115, at 794 (describing the 1957 joint resolution as "one of the broadest war delegations in American history").

168 Ramsey & Waxman, *supra* note 115, at 795. It is not clear to what extent this resolution was intended to authorize a presidential use of force, since it refers to action by "the United States" and also goes on to state that any use of force must be "consonant . . . with the Constitution of the

respect to the 1964 Gulf of Tonkin Resolution, which, in response to alleged attacks by North Vietnamese forces on U.S. naval vessels, stated "[t]hat the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States *and to prevent further aggression*."[169] Some have construed the 1973 War Powers Resolution to trigger this concern; by mandating the discontinuance of uses of force not authorized by Congress after sixty days, it could be viewed as implicitly delegating general short-term war authority to the President without identifying any particular enemy.[170] And others have argued that collective self-defense treaties like the NATO pact unconstitutionally delegate prospective war authority to the President.[171]

Importantly, though, all of these arguments are either seriously contested or hypothetical. No president has relied on the 1957 resolution. The Gulf of Tonkin Resolution can be interpreted as implicitly specifying North Vietnam as the enemy and Southeast Asia as the theater of conflict.[172] The War Powers Resolution is probably at most a tacit acceptance by Congress of some short-term presidential war authority, not a delegation.[173] And self-defense treaties condition the U.S. obligation to use force on its "constitutional processes"

United States." Joint Resolution to Promote Peace and Stability in the Middle East, Pub. L. 85-7, 71 Stat. 5 (1957).

169 Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia, Pub. L. No. 88-408, § 1, 78 Stat. 384 (1964) (emphasis added); *see, e.g.*, Alexander M. Bickel, *Congress, the President, and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 137 (1971); Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623, 692 (1972); William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 16 (1972). William Rehnquist, when serving as Assistant Attorney General, responded to this argument by invoking *Curtiss-Wright* for the proposition that "the principle of unlawful delegation of powers does not apply in the field of external affairs." William H. Rehnquist, *The Constitutional Issues—Administration Position*, 45 N.Y.U. L. REV. 628, 637 (1970). That is the sort of overly general claim that we critique in this Article.

170 *See* Ramsey & Waxman, *supra* note 115, at 802 (discussing criticism of the resolution, including from Senator Eagleton).

171 For scholarly debate over whether treaties can authorize presidential uses of force that would otherwise require congressional authorization, compare, for example, Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63 (1991) (in favor), and David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers*, 70 U. COLO. L. REV. 1491 (1999) (same), with Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74 (1991) (against), and Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597 (1993) (same).

172 JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 26 (1993). Among other things, the preamble of the resolution specifically refers to actions by "the Communist regime in North Vietnam." *Id.*

173 Even the executive branch does not claim that the resolution is a delegation. *See, e.g.*, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, *supra* note 119, at *7 & n.2.

and thus do not purport to delegate away Congress's authority over the issue.[174]

Two modern authorizations of force that have received particular attention are the 2001 AUMF enacted after the 9/11 attacks and the 2002 AUMF authorizing the use of force against Iraq. The 2001 AUMF authorizes "all necessary and appropriate force against those nations, organizations, or persons [that the President] determines planned, authorized, committed, or aided the terrorist attacks,"[175] and the 2002 AUMF authorizes forces against Iraq "as [the President] determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."[176]

Although they are broad in scope, we doubt that either one presents a serious nondelegation problem, even under a reinvigorated nondelegation doctrine. The 2001 AUMF identifies an enemy in general terms and the President's remaining discretion to specify the enemy involves a factual determination that relates directly to his or her independent defensive war authority. And the 2002 AUMF specifically identifies the enemy, contains procedural restrictions, and overlaps with the President's self-defense powers. The fact that both of these AUMFs give the President discretion over whether and how to use force is consistent with the argument we have made about how Congress can unlock the Commander in Chief power; the fact that a power is unlocked does not mean that it must be deployed.

B. *Independent Powers Not Tied to Foreign Relations*

As discussed above, one important reason to conceptualize the qualification to the nondelegation doctrine as related to the President's *independent* powers, as opposed to his or her *foreign affairs* powers, is that the President's independent powers do not always relate to foreign affairs. As we noted in Section II.B, three such independent powers not tied strictly to foreign relations arise from the Take Care Clause: the protective power, which arises most notably in the context of authorizations related to domestic insurrections; the power to fill in details of a legislative scheme, which is implicated by every statutory authorization to the executive branch; and

174 *See, e.g.*, LOUS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 260 (2d ed. 1996); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 203 (1990).

175 Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

176 Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498 (2002).

prosecutorial and civil enforcement discretion, which are also implicated to some degree by most if not all statutes. There are a variety of other domestic presidential powers that we do not consider here—for example, the pardon power and the power to propose legislation—because they are less relevant to the sorts of examples that are the focus of the Article.

1. Protective Power

The protective power may be highly relevant to the constitutionality of statutes that have long authorized the President to quell insurrections. The 1807 Insurrection Act, for example, authorized the President to call out the regular armed forces "for the purpose of suppressing such insurrection, or of causing the laws to be duly executed . . . as shall be judged necessary . . . ."[177] The current version of the Act provides:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.[178]

Many commentators worry that the Act is dangerously vague in the discretion it confers on the President to use military personnel.[179] But if the President's independent protective power has any validity, it seems clear that the vagueness in the Insurrection Act does not rise to the level of a nondelegation problem, at least with respect to matters covered by the protective power. Any delegation concerns here are diminished because Congress has authorized the President to take action conditioned on certain presidential determinations ("unlawful . . . assemblages," "necessary to enforce") that the President is independently authorized to make, with regard to protecting federal property and interests, under the protective power.[180] In other words, this Act is in part what we have termed an independent discretion authorization. Note, importantly, that this protective power rationale justifies the broad authorization as it relates to the protection of U.S. property and interests. It would not save the statute from a reinvigorated

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177 An Act Authorizing the Employment of the Land and Naval Forces of the United States, in Case of Insurrection, ch. 39, 2 Stat. 443 (1807).

178 10 U.S.C. § 252.

179 *See, e.g.*, BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY 333-37 (2020); Joseph Ninn, *The Insurrection Act Explained*, BRENNAN CTR. FOR JUST. (Apr. 21, 2022), https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained [https://perma.cc/R7ST-QFA9].

180 10 U.S.C. § 252.

nondelegation challenge to the President's use of military force in the domestic realm to redress private threats beyond that justified by the protective power's public-property focus.

Similar rationales apply to statutes, dating back to near the Founding, that have delegated authority to the President to call out the militia to repel invasions. The Constitution gives Congress the authority to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," but Congress has often allowed the President to determine when this should occur.[181] A 1795 statute provided, for example,

> [t]hat whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion . . . .[182]

The Supreme Court interpreted that 1795 statute in *Martin v. Mott*.[183] The Court, in an opinion authored by Justice Story, noted that "there is no ground for a doubt" that the authorization to the President was lawful.[184] Then, in the course of explaining why the President was the proper party under the statute to make the emergency trigger determination, the Court stated that "[w]e are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons."[185] Story did not make this point to defeat a nondelegation argument, but the case nonetheless shows how Congress's authority to call up the militia was linked to the President's Commander in Chief authority, which expressly extends to "the Militia of the several States,"[186] and which allows him to make judgments about what is needed to repel an invasion. The Court's judgment is consistent with what we have called an independent discretion authorization. Even though the President

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181 U.S. CONST. art. I, § 8, cl. 15; *see also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 961 (2008) ("From the outset, Congress chose to exercise its 'calling forth' power [over the militia] largely by delegating it to the President."). *See generally* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149 (2004).

182 An Act to Provide for Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasion; and to Repeal the Act Now in Force for Those Purposes, ch. 36, 1 Stat. 424 (1795).

183 25 U.S. 19 (1827). The case involved the court-martial of an individual for failing to serve in a state militia after it was called up by President Madison during the War of 1812.

184 *Id.* at 29.

185 *Id.* at 30.

186 U.S. CONST. art. II, § 2.

did not have the independent authority to call up the militia, he possessed independent power to make the policy judgment at issue in Congress's delegation of that authority.[187]

2. Factfinding and Filling in Details

As noted above, the President's powers to determine the relevant facts and fill in the details of a legislative scheme have a pedigree stretching at least back to *Wayman* and appear to be acceptable under even a revived nondelegation doctrine. An unexamined question in the case law is how these powers work when the factfinding or details concern a congressional authorization for executive branch action *in an area related to an independent power*. It might be that the independent power context adds nothing. But the opposite might be true as well. It might be that the President's leeway to determine facts and fill in the details is broader when the authorizing statute relates to an area of independent power.

The latter approach finds support in *Dames & Moore v. Regan*, which (as discussed further in Section III.C) recognized that the President has greater discretionary leeway even to modify private rights when Congress has legislated in an area not directly covering the presidential action but nonetheless related to an independent presidential power.[188] It also finds support in some lower court decisions. For example, the D.C. Circuit has determined that Congress's authorization to the executive branch (in several statutes) to determine which nations are "state sponsors of terrorism"—a determination that has various legal effects—probably falls within the factual assessment allowance, in part because the assessment relates to the President's independent powers.[189] As the court noted, "[a] statute that delegates factfinding decisions to the President which rely on his foreign relations powers is less susceptible to attack on nondelegation grounds than one delegating a power over which the President has less or no inherent

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187 U.S. CONST. art. I, § 9, cl. 2. A similar idea may explain the constitutionality of congressional delegations of authority to suspend the writ of habeas corpus. *See* U.S. CONST. art. I, § 9, cl. 2. Because the Constitution refers to suspension of the writ in Article I, it is generally assumed that this is a congressional power, but Congress has in a number of instances throughout history delegated suspension authority to the executive branch. *See* Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 252 (2014). In these situations, the President has independent authority to determine what is needed to protect public safety in response to a rebellion or invasion, which can be interlinked with Congress's suspension authority.

188 *See* 453 U.S. 654, 682 (1981) ("In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have *some measure of power* to enter into executive agreements without obtaining the advice and consent of the Senate.") (emphasis added).

189 Owens v. Republic of the Sudan, 531 F.3d 884, 893 (D.C. Cir. 2008).

Constitutional authority."[190] Both of these examples involve independent powers related to foreign relations, but importantly, nothing in the factfinding or filling in the details logic would be limited to that context.

3. Prosecutorial and Civil Enforcement Discretion

The President's enforcement discretion, and especially his or her prosecutorial discretion, is an independent power that might reduce delegation concerns in certain contexts. A good example of how this could be relevant concerns an aspect of the statute in *Curtiss-Wright*. Recall that the statute at issue in that case made it unlawful to sell arms upon a presidential finding that the prohibition would promote peace between the warring parties, "except under such limitations and exceptions as the President prescribes . . . ."[191]

On first glance, this exception seems like a broad and unguided authorization to the President to determine the scope of the statute. But at least to some degree, the power provided by the exception is functionally similar to the President's discretion to enforce federal criminal laws based on resource constraints and executive branch policy concerns. To the extent that the statute marries a congressional power to legislate criminal law to the President's independent discretionary control over federal law enforcement, it would raise fewer delegation concerns, consistent with the independent discretion linkage that we have outlined. (We discuss the other element of the statutory authorization in *Curtiss Wright*—to determine whether the arms ban would promote peace—below.)

C. *IEEPA*

Congress has long delegated to the President the authority to take actions during times of emergency, including actions relating to trade and finance. The most significant such statute today is the International Emergency Economic Powers Act (IEEPA),[192] a statute that was designed to narrow an even broader grant of emergency authority under the earlier Trading with the

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190 *Id.* at 891; *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018) ("[W]hen the President adopts 'a preventive measure . . . in the context of international affairs and national security,' he is 'not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions.'") (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 35 (2010)).

191 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 312 (1936).

192 *See* International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977); CHRISTOPHER A. CASEY, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 2 (2024).

Enemy Act.[193] IEEPA confers broad powers on the President to regulate foreign-owned property and international commercial transactions upon a declaration of emergency.[194] Presidents are authorized to declare such an emergency upon a finding of "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States . . . ."[195] And once a president declares such an emergency, IEEPA authorizes the President to regulate a variety of property interests in a variety of ways without much further guidance.[196] IEEPA has been used by presidents to address a broad range of issues, including international terrorism, the proliferation of weapons of mass destruction, foreign election interference, and the promotion of human rights and democracy.[197]

The Supreme Court upheld presidential actions under IEEPA in *Dames & Moore*.[198] After U.S. diplomatic personnel were seized in Iran and held as hostages, President Carter declared an emergency under IEEPA and used the authority delegated under that statute to freeze Iranian government assets in the United States.[199] Upon reaching an agreement with Iran for release of the hostages, he invoked IEEPA to nullify prejudgment attachments of the frozen assets and to transfer the assets to the federal government so that it could distribute them back to Iran.[200] The Court concluded that these actions fell within the plain language of the statute and were consistent with its purpose.[201] And it observed that since the President's action was "taken pursuant to specific congressional authorization, it [was] 'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'"[202] The agreement with Iran also called for the suspension of billions of dollars of U.S. claims pending in U.S. courts.[203] The Court concluded that,

193 For rejection of a nondelegation challenge to the Trading with the Enemy Act, see *Sardino v. Fed. Rsrv. Bank of N.Y.*, 361 F.2d 106, 110 (2d Cir. 1966) (concluding that the nondelegation challenge was foreclosed by *Curtiss-Wright*).

194 *See* 50 U.S.C. § 1702. Congress allowed presidents to continue economic embargoes that were already in place under the Trading with the Enemy Act.

195 50 U.S.C. § 1701(a).

196 *See* 50 U.S.C. § 1702.

197 *See* Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATL. (Jan.–Feb. 2019), https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418 [https://perma.cc/7MTG-YHKB].

198 453 U.S. 654, 686-88 (1981).

199 *Id.* at 662.

200 *Id.* at 665.

201 *Id.* at 672-74.

202 *Id.* at 674 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

203 *Id.* at 665.

although IEEPA did not authorize such a suspension, it and another statute were still relevant when assessing the legality of that action, in that they "indicat[ed] congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."[204] The petitioner in the case did not raise a nondelegation challenge to IEEPA, and the Supreme Court did not consider that issue.

The discretion conferred under IEEPA is quite broad, and the violation of regulations issued by the executive branch under it can carry criminal penalties. Nevertheless, lower courts have consistently rejected nondelegation challenges to IEEPA.[205] These courts have reasoned that the standards in the statute satisfy the Supreme Court's "intelligible principle" test, given that IEEPA is limited to situations involving (a) foreign threats (b) to the national security, foreign policy, or economy of the United States (c) that are unusual and extraordinary.[206] They have further maintained that these constraints are sufficient even if, due to the authorization to define criminal activity, a stricter standard is warranted.[207] And they have noted that the Supreme Court itself gave effect to IEEPA's broad delegation in *Dames & Moore*.[208]

This example illustrates why it is unsatisfactory to refer to a "foreign affairs" qualification to the nondelegation doctrine. Declarations of emergencies, even if they concern foreign threats, can relate to both domestic and foreign affairs. Moreover, the President's foreign affairs powers probably do not include the authority to impose the economic restrictions authorized under IEEPA. Perhaps the authorization to assess external threats to the United States can be defended under the independent discretion concept that we have outlined. The situation under IEEPA might be viewed as similar to the hypothetical we provided in Section II.C about an arms embargo triggered by a presidential determination that the United States should remain neutral.[209] However, there is no clearly settled presidential emergency assessment power, especially one extending to economic threats, in the way that there is a settled presidential power over declarations of neutrality. Moreover, IEEPA authorizes the President in a declared emergency to take substantive measures related to property interests in broader and more open-

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204 *Id.* at 677.

205 *See, e.g.*, United States v. Mirza, 454 F. App'x 249, 255-56 (5th Cir. 2011); United States v. Amirnazmi, 645 F.3d 564, 575-77 (3d Cir. 2011); United States v. Dhafir, 461 F.3d 211, 215-17 (2d Cir. 2006); United States v. Arch Trading Co., 987 F.2d 1087, 1092-94 (4th Cir. 1993).

206 *See* 50 U.S.C. § 1701(a).

207 The Supreme Court reserved judgment on that issue in *Touby v. United States*, 500 U.S. 160, 166 (1991).

208 *See, e.g.*, *Amirnazmi*, 645 F.3d at 575 (citing *Dames & Moore*, 453 U.S. at 675).

209 *See supra* note 147 and accompanying text.

ended terms than the hypothetical that is hard to square with an independent presidential power.

D. *Curtiss-Wright*

It is unclear whether the statute at issue in *Curtiss-Wright* can be justified based on the independent powers qualification. Although the President has independent authority to decide whether the United States should remain neutral in a foreign conflict, the statutory authorization there was not premised on a presidential determination of neutrality. Instead, Congress allowed the President to criminalize arms sales to the warring countries if he found that the prohibition "may contribute to the reestablishment of peace between those countries."[210] This determination is sufficiently broad and predictive that, as the district court in that case concluded,[211] it probably does not qualify as a mere factual predicate. Nor is the delegation merely redundant. The President could not have unilaterally made the arms shipments in *Curtiss-Wright* a domestic crime; he needed Congress for that.

That said, it could be argued that the "contribute to the reestablishment of peace" evaluation fell within the President's independent discretion relating to determinations of U.S. neutrality, although this is less clear than if the statutory trigger had actually turned on a declaration of neutrality. The President's determination under the statute was also arguably connected to his general power over diplomacy, especially given that Congress had directed him to consult "with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary" before making the determination.[212] Alternatively, to pick up on a different point we made above, it could be argued that the President had more discretion to determine the triggering facts or fill in the details under the statute because the authorization related to his independent powers over neutrality and diplomacy.[213]

If the authorization in *Curtiss-Wright* cannot be justified on these grounds, the strongest basis for sustaining it (assuming a revived nondelegation doctrine) would likely be historical gloss. As the Court noted, "[t]he principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day."[214]

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210 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 312 (1936).

211 *See* United States v. Curtiss-Wright Exp. Corp., 14 F. Supp. 230, 235 (S.D.N.Y. 1936).

212 *See Curtiss-Wright*, 299 U.S. at 312.

213 *See supra* subsection III.B.2.

214 *Curtiss-Wright*, 299 U.S. at 322.

E. *Ex Ante Congressional–Executive Agreements*

Article II empowers the President to make treaties "by and with the Advice and Consent" of "two-thirds of the Senators present" and, with caveats noted above, certain sole executive agreements.[215] The President can also make executive agreements that Congress authorizes in advance—so-called ex ante congressional–executive agreements.[216] As early as 1792, Congress authorized the Postmaster General to "make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices."[217] Today, such agreements are the primary vehicle for the President to make binding international agreements for the United States. The executive branch makes hundreds of them each year, and they constitute a large majority of all binding U.S. agreements.[218]

There is little doubt that congressional–executive agreements are lawful in general based on the long-settled and prevalent practice of these two branches dating back to the Founding.[219] But whether and when such agreements can survive scrutiny under a revitalized nondelegation doctrine is a harder question. The legal justification for congressional–executive agreements, beyond practice, remains unsettled. And many of the purported congressional authorizations to make such agreements confer very broad discretion on the President.

For example, to further various policy aims, such as combatting world hunger, promoting trade, and preventing conflicts, Congress has authorized the Secretary of Agriculture to "negotiate and execute agreements with developing countries and private entities to finance the sale and exportation of agricultural commodities to such countries and entities."[220] In another example, Congress authorized the President "to conclude agreements, including reciprocal maritime agreements, with other countries to facilitate control of the production, processing, transportation, and distribution of narcotics analgesics, including opium and its derivatives, other narcotic and

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215 U.S. CONST. art. 2, § 2; *see supra* notes 132–134 and accompanying text.

216 A small percentage of congressional–executive agreements are negotiated by the President and then approved by Congress. These ex post congressional–executive agreements do not raise any delegation issues because Congress approves the entire agreement before it takes effect.

217 *See* Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239.

218 *See* Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1213 & n.27 (2018). For a summary of the range of congressional–executive agreements, see Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 156-65 (2009).

219 *See* BRADLEY, *supra* note 89, at ch. 4. For a decision upholding a trade-related congressional–executive agreement based in part on gloss, see *Star-Kist Foods, Inc. v. United States*, 169 F. Supp. 268, 278-80 (Cust. Ct. 1958).

220 7 U.S.C. § 1701(b).

psychotropic drugs, and other controlled substances," all in order to serve specified aims related to the control of narcotics trafficking.[221] Or consider the 1792 statute, noted above, that authorized the Postmaster General to make reciprocal postal agreements.[222]

Statutes such as these, and there are many more, authorize agreements that do not at first glance appear to implicate any substantive independent power of the President. The President has no independent power related to agricultural or anti-narcotics policy or postal service.[223] These delegations thus do not appear to involve redundant delegation, or work in tandem with a relevant area of presidential policy discretion, or unlock an Article II authority. On this view, congressional–executive agreements of this sort might stand or fall in the face of a revived nondelegation doctrine based on the scope of authority conferred.

But there might be nonsubstantive independent powers that implicate the qualification. A plausible theory, consistent with longstanding practice, is that the President's undoubted power over negotiation of international agreements is the relevant independent power when Congress authorizes the President to make international agreements on a particular topic. In this situation, Congress can be seen as combining whatever legislative power it has over the subject matter, plus its necessary and proper power to "carry[] into Execution"[224] the President's negotiation power under Article II, with the President's broad Article II discretion to negotiate agreements.[225] While the President does not have plenary independent authority to *conclude* agreements, it is settled that no international agreements can ever be concluded without the President's concurrence, so the President's authority is greater in this context than in connection with ordinary legislation. This authority is not merely an ability to recommend proposed agreements to the legislature but rather includes, for example, the authority to determine the nation's aims and positions taken during the negotiations, to conclude nonbinding arrangements on essentially any subject, and to make binding

221 22 U.S.C. § 2291(a)(2).

222 *See supra* note 217 and accompanying text.

223 *See also, e.g.*, United States v. Guy W. Capps. Inc., 204 F.2d 655, 659-60 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) (suggesting that a trade-related executive agreement did not fall within the President's independent constitutional authority).

224 U.S. CONST. art. I, § 8, cl. 18.

225 For an argument along these lines, see HENKIN, *supra* note 174, at 216. Henkin limits this argument to congressional–executive agreements that are non-self-executing, which the vast majority are.

modus vivendi agreements to preserve the status quo pending further negotiation.[226]

In addition to this argument from the President's negotiation power, at least some congressional–executive agreements can be defended on the ground that they implicate a substantive independent presidential power. Some congressional–executive agreements, for example, relate to military affairs, including status of forces agreements, military cooperation and training agreements, and agreements related to weapons and other military hardware—all potentially connected to the President's Commander in Chief power.[227] The presence of such independent power assuages delegation concerns when Congress authorizes a congressional–executive agreement. This is so because Congress is not simply giving away its Article I powers to the President. Rather, it is authorizing the President to do something that overlaps with his or her own independent power, and thus that warrants some deference, along the lines of one of the general points we outlined at the end of Part II.

F. *Trade Sanctions*

Article I of the Constitution assigns to Congress the authority to regulate commerce with other nations.[228] Congress, however, has often authorized the President to act in this area. Indeed, trade-related measures were at issue in a number of the Supreme Court's historic decisions upholding congressional delegations, including *Cargo of the Brig Aurora v. United States*, *Field v. Clark*, and *J.W. Hampton*.[229]

Section 232 of the Trade Expansion Act of 1962 provides that if the Secretary of Commerce finds that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," the President is authorized to "take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national

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226 *See* Curtis A. Bradley, Jack Goldsmith & Oona A. Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. CHI. L. REV. 1281, 1293-99 (2023).

227 *See* RESTATEMENT (SECOND) FOREIGN RELS. L. U.S. § 121 cmt. b (AM. L. INST. 1965) ("A large proportion of the international agreements made under the powers of the President and intended to create legal relationships under international law have been based on his power as commander-in-chief and have provided for the conduct of military operations with allies of the United States.").

228 U.S. CONST. art. I, § 8, cl.3.

229 *See* Cargo of the Brig Aurora v. United States, 11 U.S. 382, 387-89 (1813); Field v. Clark, 143 U.S. 649, 695-97 (1892); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 413 (1928).

security."[230] The statute also lists a number of factors that the President is to consider when deciding what action to take.[231]

The Supreme Court dismissed delegation concerns with respect to Section 232 in a 1976 decision, *Federal Energy Administration v. Algonquin SNG, Inc.*[232] In that case, President Ford had relied on the statute to impose licensing fees on imported oil. The court of appeals construed Section 232 as not conveying authority to impose licensing fees, in part to avoid delegation concerns.[233] The Supreme Court reversed, concluding that the statute did convey this authority and that, even so, it did not present any serious delegation concerns. Without much analysis, the Court insisted that "the standards that [Section 232] provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack."[234]

President Trump controversially used Section 232 to impose high tariffs on aluminum and steel imports, and his actions were challenged under the nondelegation doctrine.[235] Relying on the *Algonquin* precedent, the Court of International Trade rejected the challenge, and the U.S. Court of Appeals for the Federal Circuit affirmed.[236] But Judge Katzmann wrote separately to explain that, although he felt constrained by Supreme Court precedent, he had serious delegation concerns about Section 232. In his view, while the trade restriction statutes at issue in *Cargo of the Brig Aurora*, *Field*, and *J.W. Hampton* "provided ascertainable standards to guide the President," Section 232 "provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress."[237]

A reinvigorated nondelegation doctrine would put Section 232 close to the line of constitutionality, as Judge Katzmann argued. The statutory trigger involves an assessment of "national security,"[238] which seems to go beyond a mere factual determination. Using the framework we have outlined, this is not a case of either a redundant delegation or an unlocking of Article II authority, given that the President has no independent constitutional

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230 19 U.S.C. §§ 1862(b)(3)(A), (c)(3)(A).

231 19 U.S.C. § 1862(d); *see also* RACHEL F. FEFER, KEIGH E. HAMMOND, VIVIAN C. JONES, DRANDON J. MURRILL, MICHAELA D. PLATZER & BROCK R. WILLIAMS, CONG. RSCH. SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS (2021) [hereinafter SECTION 232 INVESTIGATIONS].

232 426 U.S. 548, 570-71 (1976).

233 *See* Algonquin SNG, Inc. v. Fed. Energy Admin., 518 F.2d 1051, 1056 (D.C. Cir. 1975) (expressing concern that the government's broad interpretation of Section 232 "would represent an anomalous delegation of almost unbridled discretion and authority in the tariff area").

234 *Fed. Energy Admin.*, 426 U.S. at 559.

235 SECTION 232 INVESTIGATIONS, *supra* note 231.

236 Am. Inst. for Int'l Steel, Inc. v. United States, 806 F. App'x 982, 983 (Fed. Cir. 2020).

237 Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1351-52 (Ct. Int'l Trade 2019), *aff'd*, 806 Fed. App'x 982, 983 (Fed. Cir. 2020).

238 19 U.S.C. §§ 1862(b)–(c).

authority over international commerce.[239] The best defense of the statute is that the President's independent authority over defense and protection includes the ability to make national security assessments, and that this ability can be interlinked with Congress's authority over trade. But this argument is highly debatable and would entail a very relaxed approach to the independent powers idea, especially given the discretion allowed under Section 232 about the measures that can be taken relating to private property. If Section 232 cannot be sustained on this ground, its constitutionality in the face of a reinvigorated nondelegation doctrine would likely depend on historical gloss. The case for gloss seems especially strong here, given that the practice of congressional delegations of trade sanctions authority dates back to near the Founding, as the Supreme Court recognized as early as 1892 in *Field*.

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The above analysis suggests that many but not all broad or vague authorizations to the executive branch related to foreign affairs, national security, and domestic security are likely to survive a revived nondelegation doctrine as a result of the independent powers qualification to that doctrine. The examples that are most difficult to square with a revived nondelegation doctrine—IEEPA and trade sanctions—demonstrate our central point that a simple categorical determination that an area involves foreign affairs or national security cannot by itself suffice to address delegation concerns.

IV. THE ROLE OF THE MAJOR QUESTIONS DOCTRINE

The independent powers qualification to the nondelegation doctrine explains why and how delegation concerns are diminished when Congress authorizes executive branch action related to independent presidential powers. As we noted in the Introduction, however, the Supreme Court has often vindicated its delegation concerns through canons of construction and principles of statutory interpretation rather than through constitutional invalidation. There is every reason to expect that this trend will continue, especially given the rise in importance of the major questions doctrine.

The major questions doctrine, based on recent precedents, requires executive branch agencies to "point to 'clear congressional authorization'" to justify exercises of "highly consequential power beyond what Congress could

239 *See, e.g.*, H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 549 (1999) ("The President has no independent power directly to regulate, tax, or interdict foreign commerce."); *see also* THE FEDERALIST NO. 69 (Alexander Hamilton) (noting that, unlike the British King, the U.S. President "can prescribe no rules concerning the commerce or currency of the nation").

reasonably be understood to have granted."[240] The Court sometimes states that this requirement is triggered when agency action has immense "economic and political significance."[241] But the Court in practice looks to a variety of factors—including the breadth of the claimed authority, the history and novelty of the agency action, persistent congressional inaction, and other contextual clues about congressional intent—to determine whether agency action is "major" and thus demands clear congressional authorization.[242]

Many scholars have worried that the major questions doctrine threatens presidential power related to foreign affairs and national security.[243] Their concern is that exercises of this power will trigger the doctrine but not survive its clear authorization requirement. For example, Professors Meyer and Sitaraman contend that the doctrine "raises serious problems for foreign affairs and national security," especially with regard to the tools the president uses for "economic warfare."[244] And Professors Eichensehr and Hathaway worry that it may threaten the executive branch's ability to conclude international agreements.[245]

This Part assesses these concerns and concludes that they are unlikely to be realized. Part of the reason is that the independent powers qualification to the nondelegation doctrine, as we have explained, often applies in the foreign affairs area and thus tempers delegation concerns. To the extent that the major questions doctrine reflects and implements these delegation concerns, its rationale does not apply when the independent powers qualification is triggered. Another reason is more specific to genuine statutory interpretation: if the major questions doctrine turns on a contextual inquiry into likely congressional intent, it is likely for a variety of reasons to have less purchase in the foreign affairs area, regardless of whether statutory authorizations relate to independent presidential power. Finally, it is

240 West Virginia v. EPA, 142 S. Ct. 2587, 2609, 2614 (2022). There was precedent before 2022 supporting a major questions doctrine, but the doctrine assumed new dimensions that year. *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1023-49 (2023); Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 252 n.5 (2024). We focus here on the contemporary doctrine.

241 *West Virginia*, 142 S. Ct. at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)).

242 *See, e.g.*, *id.* at 2595 (noting the importance of statutory "context" to major questions analysis, and concluding that the "history and the breadth of the authority that [the agency] has asserted," in addition to the "economic and political significance of that assertion," informs whether a question is major); *see also* Deacon & Litman, *supra* note 240, at 1012-13 (noting that the Court's indicia of "majorness" in major questions doctrine cases include the "costs imposed by agency policy," whether the policy is "politically significant or controversial," Congress's failure to legislate in certain ways, the "novelty of the policy," and the implications for other possible agency regulations).

243 *See supra* note 13 and accompanying text.

244 Meyer & Sitaraman, *supra* note 13, at 58.

245 *See* Eichensehr & Hathaway, *supra* note 13, at 1865.

important to remember that the major questions doctrine does not defeat executive branch actions that are clearly authorized by Congress, which is often the case for even major foreign affairs actions.

A. *Major Questions, Independent Power, and Foreign Affairs*

The applicability of the major questions doctrine to foreign relations and national and domestic security statutes turns on the justifications for the major questions doctrine. The Court has said that the doctrine is grounded in two ideas: "separation of powers principles and a practical understanding of legislative intent."[246]

Justice Gorsuch has emphasized and provided a prominent explanation for the first idea, insisting that the major questions doctrine serves the separation of powers concerns underlying the nondelegation doctrine.[247] On this view, the major questions doctrine guarantees "that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives."[248] It does so by applying a clear statement rule to ensure that Congress does not "divest itself of its legislative power by transferring that power to an executive agency."[249] As Professor Sunstein sums up Gorsuch's view, the "goal of the doctrine is thus to ensure congressional primacy by avoiding a situation in which agencies exercise authority that the national legislature has not clearly granted them."[250] Viewed this way, the major questions doctrine is a substantive canon "that advance[s] values external to a statute."[251]

Under the substantive canon approach, the major questions doctrine is implicated only if delegation concerns are present. As we explained in Parts II and III, certain broad authorizations of executive branch action related to an independent presidential power do not implicate delegation concerns. Justice Gorsuch recognized this point in his *Gundy* dissent when he observed that "when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised

246 *West Virginia*, 142 S. Ct. at 2609.

247 *See id.* at 2617 (Gorsuch, J., concurring); Nat'l Fed. of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).

248 *Nat'l Fed. of Indep. Bus.*, 142 S. Ct. at 668.

249 Gundy v. United States, 139 S. Ct. 2116, 2142 (Gorsuch, J., dissenting); *see also West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (contending that the major questions doctrine ensures that "the government does 'not inadvertently cross constitutional lines'").

250 Sunstein, *supra* note 240, at 253.

251 Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring).

over matters already within the scope of executive power.'"[252] It follows that, in these instances, the major questions doctrine should be inapplicable under a substantive canon approach.

The second idea underlying the major questions doctrine, about the "practical understanding of legislative intent," rests on "common sense as to the manner in which Congress [would have been] likely to delegate."[253] On this view, the Court applies the clear authorization requirement when on the basis of "various circumstances" it concludes that Congress was "unlikely" to have authorized the agency action, even in cases where "regulatory assertions [have] a colorable textual basis."[254] As noted above, the Court looks to a number of factors, including the history and novelty of the agency action, in making this determination.[255]

Three related considerations suggest that, under this congressional intent approach, the major questions doctrine will often not be triggered when Congress authorizes executive branch action related to foreign affairs.

First, when Congress authorizes executive branch action in areas in which the President has independent power, it may expect that the executive branch will make major policy decisions related to that power. Both the majority in *Biden v. Nebraska* and Justice Barrett in concurrence highlighted that, in Justice Barrett's words, the Court should "treat[] the Constitution's structure as part of the context in which a delegation occurs."[256] Since Article I vests legislative power in Congress, they conclude, a Congress that considers constitutional structure would normally intend to make major policy decisions itself.[257] But the reasons for the assumption that Congress intends

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252 *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (quoting Schoenbrod, *supra* note 63, at 1260).

253 *West Virginia*, 142 S. Ct. at 2609.

254 *Id.*

255 In a concurrence in *Biden v. Nebraska*, Justice Barrett joined the majority opinion in full and emphasized this congressional intent approach of the Court's major questions doctrine jurisprudence. *See* 143 S. Ct. at 2376, 2378 (Barrett, J., concurring) (construing the major questions doctrine as "an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency'"). As a textualist leery of substantive canons, she resists tying this notion to a clear statement requirement, and she believes that the clarity of Congress's authorization can come from context as well as from text. *See id.* at 2380; *cf.* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 521 (2023) (concluding that substantive canons are generally incompatible with textualism); Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 916-17 (2024) (discussing how the major questions doctrine could be conceived of as a linguistic canon that would be compatible with textualism).

256 143 S. Ct. at 2380 (Barrett, J., concurring).

257 *See id.* at 2375 (majority opinion) (concluding from Congress's control of the purse in Article I and other "separation of powers concerns" that "[t]he basic and consequential tradeoffs inherent in a mass debt cancellation program are ones that Congress would likely have intended for itself") (internal quotations and citation omitted); *id.* at 2380 (Barrett, J., concurring) ("Because the

to make all major policy decisions itself does not necessarily hold when it legislates in an area of independent presidential power. One might instead assume, as the Court did in *Loving*, that Congress intends the executive branch, rather than itself, to make some major policy decisions.

Second, and relatedly, the Court has frequently observed that, given the different competencies of the two branches, Congress has good reason to—and intends to—authorize many executive branch actions related to foreign affairs in broad or general terms. As it said in *Zemel*, "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."[258] Several other decisions make similar points.[259] The fact that many of the broadest congressional authorizations to the executive branch in the eighteenth and nineteenth centuries involved military affairs, trade, and related foreign affairs matters confirms the Court's insight about congressional expectations in these decisions.

Third, the Supreme Court's major questions doctrine cases often invoke the novelty or lack of historical precedent for the challenged executive branch practice as an important contextual indicator that the action is "major" and that the major questions doctrine's clear authorization requirement is

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Constitution vests Congress with '[a]ll legislative Powers,' Art. I, § 1, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch."). Of course, one might plausibly think that Congress in the modern era legislates broadly in the domestic realm too with the expectation that agencies will make the large and important policy decisions. *See, e.g.*, *id.* at 2397 (Kagan, J., dissenting). But in *Biden v. Nebraska* and other major questions decisions, the Court saw it differently. *See West Virginia*, 142 S. Ct. at 2609 ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"). The empirical evidence about congressional expectations is "contestable." Deacon & Litman, *supra* note 240, at 1047 & n.200.

258 Zemel v. Rusk, 381 U.S. 1, 17 (1965). The Court added the caveat that Congress could not even in this context "grant the Executive totally unrestricted freedom of choice," and it emphasized that historical context could inform the meaning of general congressional authorizations. *Id.* at 17-18.

259 *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) (noting that "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," in the context of settling claims in the course of resolving a foreign policy crisis); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) ("It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction . . . ."); Field v. Clark, 143 U.S. 649, 691 (1892) (surveying a century of congressional authorizations related to trade and concluding that "in the judgment of the legislative branch of the government, it is often desirable, if not essential . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations").

warranted.[260] By contrast, a long historical pedigree for the asserted authority is a strong contextual indicator of congressional intent to authorize the action.[261] Presidential actions pursuant to broad congressional authorizations related to foreign affairs often have long historical pedigrees that can in various ways inform congressional intent to approve the actions in question.[262] To the extent that this is so in particular instances, the major questions doctrine's clear authorization requirement does not apply.[263] Importantly, this assessment of the historical practice relating to a particular statute does not require any bright-line distinction between foreign and domestic affairs.

B. *Applications*

The analysis above suggests that the applicability of the major questions doctrine in the context of the statutory authorizations discussed in this Article will depend on which rationale for the major questions doctrine the Court ultimately adopts, and, depending on the rationale, whether the authorization relates to an independent presidential power or whether the context of the authorization suggests that the major questions doctrine is inapplicable. In many statutory contexts relating to foreign affairs, both rationales will point toward non-application of the major questions doctrine. But in some circumstances, the particular rationale will matter.

Before proceeding, we need to bracket an issue that we do not attempt to resolve here, which is whether it makes a difference, for purposes of the major questions doctrine, whether an authorization is directed at the President rather than an administrative agency. It might be that the doctrine—which aims to ensure that Congress has authorized agency action of wide-ranging

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260 *See, e.g.*, *Nebraska*, 143 S. Ct. at 2374 (noting "the sweeping *and unprecedented* impact of the Secretary's loan forgiveness program") (emphasis added); Nat'l Fed. of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 666 (2022) ("[The] *lack of historical precedent*, coupled with the breadth of authority that the Secretary now claims, *is a 'telling indication' that the mandate extends beyond the agency's legitimate reach*.") (emphasis added); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (noting the "unprecedented" nature of the agency's claim to very broad authority as a reason why the major questions doctrine applied); *see also* Deacon & Litman, *supra* note 240, at 1073-78 (analyzing "regulatory anti-novelty" in the Court's major questions doctrine cases).

261 *See West Virginia*, 142 S. Ct. at 2610 (noting in the context of the major questions doctrine that "established practice may shed light on the extent of power conveyed by general statutory language") (quoting FTC v. Bunte Brothers, Inc., 312 U.S. 349, 352 (1941)).

262 *See, e.g.*, Haig v. Agee, 453 U.S. 280, 291-92 (1981); *Zemel*, 381 U.S. at 11-12; *cf. Dames & Moore*, 453 U.S. at 686 ("[L]ong-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.").

263 The congressional intent approach may overlap with the substantive canon approach in that, when Congress delegates in areas in which the President has independent power, it may expect that the President will be making major policy decisions related to that power.

significance—has greater purchase with regard to agency authorizations, since agencies normally "are creatures of statute" and "accordingly possess only the authority that Congress has provided."[264] Indeed, all of the Supreme Court's major questions doctrine cases thus far have involved authorizations to agencies rather than to the President.[265] Many foreign affairs authorizations, however, are directed at the President. On the other hand, some scholars argue that the concerns underlying the nondelegation doctrine are actually heightened when the authorization is made directly to the President, since (among other things) presidential action is not subject to the process requirements of the Administrative Procedure Act (APA).[266] The Court has provided little guidance on this question.[267]

1. Economic National Security Statutes

Professors Meyer and Sitaraman have argued that the President's orders and regulations in reliance on IEEPA and Section 232 (both discussed in Part III) to engage in economic warfare with foreign countries is "likely to run afoul of the [major questions doctrine] when used for national security

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264 *Nat'l Fed. of Indep. Bus.*, 142 S. Ct. at 665.

265 The Supreme Court is considering this Term whether to overturn the *Chevron* doctrine, which concerns deference to administrative agencies about the scope of the statutes they administer. *See* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429, 2429 (2023) (granting certiorari); Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325, 325 (2023) (same). The *Chevron* doctrine by its terms concerns only delegations to administrative agencies, and overturning it would potentially leave in place similar deference doctrines that apply to presidential action in foreign affairs. *See generally* Bradley & Goldsmith, *supra* note 4, at 2084 n.150; Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

266 *See* Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (holding that presidential action is not subject to the APA); Rebecca L. Brown, *Who Constrains Presidential Exercise of Delegated Powers?*, 29 WM. & MARY BILL RTS. J. 591, 593 (2021) (expressing concern that delegations to the President are not subject to the APA's "obligation to avoid arbitrary action"); *see also* David B. Froomkin, *The Nondelegation Doctrine and the Structure of the Executive*, 41 YALE J. ON REG. 60, 63 (2024) (arguing that the nondelegation doctrine is designed to encourage delegations to administrative agencies rather than to the President); *cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2369 (2001) (arguing that presidential direction of agencies enhances political accountability but that authorizations to the President raise rule of law issues).

267 The issue of president-versus-agency delegation implicates broader tensions in the Supreme Court's current approach to administrative law, which seeks both "to give the President control over the executive branch and to isolate power in the proper branch of government." Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1771 (2023); *see also* Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 37 (2017) ("The distinction between these two concerns about executive power—that it is politically unaccountable and that it is aggrandized—matters because their respective remedies may stand in some tension.").

purposes."[268] They predict that the Supreme Court's most likely approach to ameliorating the effect of the major questions doctrine in this context will be for it to impose a "foreign affairs exceptionalism" carveout for national security and foreign affairs statutes akin to the one that they attribute to *Curtiss-Wright*.[269] But they say that this approach will be an "inevitable failure" and "unworkable" for several reasons having to do with the difficulty, discussed in Part I, of distinguishing between domestic and foreign affairs for executive actions pursuant to statutes that seem to implicate both.[270] They conclude that the more workable solutions, each of which has its own limitations, would be either for Congress to legislate with more specification, for the Court to apply a more restrained major questions doctrine, or for the judiciary to become more involved in foreign policymaking.[271]

We contend that the applicability of the major questions doctrine in this context will depend on which rationale for the doctrine the Court ultimately adopts. The major questions doctrine would more likely apply to these statutes under the substantive canon approach. As Part III made clear, Section 232 and especially IEEPA are not authorizations that obviously connect to independent presidential power in ways that would warrant the independent powers qualification. If they do not, and assuming delegation concerns are not ameliorated by historical gloss, the major questions doctrine would apply to major questions under these statutes.

But the outcome is almost certainly different if the congressional intent approach prevails. Both IEEPA and Section 232 are authorizations that directly and expressly relate to foreign affairs. As such, this is an area where Congress can be expected to perceive comparative competence in the executive branch and provide broad authorization for major presidential action. Importantly, one can reach this conclusion without having to revert to a foreign-versus-domestic affairs distinction, even though in these contexts the statutes' foreign affairs and national security focus is evident. The reason has to do with historical practice. There is a settled practice of about a century of the executive branch exercising emergency powers in many important contexts pursuant to the broadly worded IEEPA and its predecessor, the Trading with the Enemy Act. And there is an even longer practice, dating to the Founding, of presidents exercising trade-related sanctions authority

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268 Meyer & Sitaraman, *supra* note 13, at 59. The authors also focus on section 301 of the Trade Act of 1974 and the Defense Production Act. *See id.* at 73-74, 77, 86. For space reasons we only discuss their arguments related to the statutes in the text, which we discussed and analyzed in Part III.

269 *Id.* at 81-82. We will assume for this analysis that presidential action under these statutes in the contexts they discuss would otherwise present major questions, though the point is debatable.

270 *Id.* at 81, 86-87.

271 *Id.* at 87-96.

pursuant to broadly worded statutes.[272] Notably, the Court has already suggested in both of these contexts that one should expect Congress to, in effect, paint with a broad brush.[273]

2. Congressional–Executive Agreements

Professors Eichensehr and Hathaway maintain that since most congressional–executive agreements (discussed in Part III) rest on implied rather than express authorization, they might not survive the major questions doctrine's clear authorization requirement when they constitute major questions.[274] They argue that courts should not use the major questions doctrine "to invalidate existing agreements or the authorities used to implement existing agreements" because (1) the agreements have unique characteristics, (2) the Court is responsible for the relatively low oversight of such agreements due to its decision in *INS v. Chadha* (which disallowed legislative veto checks on delegations), and (3) historical gloss "support[s] greater tolerance for broad delegations in foreign relations cases than on domestic issues."[275] They further urge courts to "carve out international agreements from the general application of the major questions doctrine," an approach they say would be "consistent with 'foreign affairs exceptionalism.'"[276] Even if such exceptionalism is problematic, they suggest that it is appropriate at least to allow for an "international agreements exceptionalism."[277]

We tend to agree that congressional–executive agreements should not be subject to the major questions doctrine.[278] But our analysis depends less on foreign affairs exceptionalism, or even international agreements exceptionalism, and more on the rationales behind the major questions doctrine.

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272 *See* BRADLEY, *supra* note 89, at ch. 8.

273 *See* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (noting in an IEEPA case that "Congress can hardly have been expected to anticipate in any detail" how the President should "respon[d] to international crises"); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 407 (1928) (noting in the context of a trade statute that "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive").

274 Eichensehr & Hathaway, *supra* note 13, at 1868-69.

275 *Id.* at 1873.

276 *Id.* at 1884.

277 *Id.* at 1887.

278 In addition to the reasons stated below for why the major questions doctrine should not apply to congressional–executive agreements, it is worth keeping in mind that most and perhaps nearly all ex ante congressional–executive agreements address relatively routine or mundane issues of cooperation that lack "extraordinary" or "staggering" economic and political significance. *See generally* Hathaway, Bradley & Goldsmith, *supra* note 118.

On the substantive canon view, the major questions doctrine does not apply when independent presidential power is appropriately in play. As noted in Part III, this can happen with congressional–executive agreements in one of two ways. Narrowly, some of these agreements implicate substantive presidential independent powers, such as the Commander in Chief power. The major questions doctrine would not apply to what would otherwise be major questions implicated by congressional–executive agreements if they rest on this power. More broadly but less certainly, the President's Article II negotiation power, amplified by the Necessary and Proper Clause, might suffice to render all properly authorized congressional–executive agreements immune from the major questions doctrine that could not otherwise be justified by a substantive independent presidential power.[279]

The major questions doctrine is even easier to avoid under the congressional intent approach. There is a strong functional need for broad delegation in the agreement-making sphere. This is because the content of the agreements will depend on negotiation with one or more foreign states, and it will often be undesirable to constrain the executive branch's negotiation ability through specific mandates. This point is supported, as in other contexts, by a long historical practice dating to near the Founding of Congress authorizing presidents to make congressional–executive agreements with limited specified guidance. Also of importance is the fact that, in response to the growth of ex ante congressional–executive agreements, Congress has chosen for the most part simply to insist on transparency rather than to limit the breadth of the agreement-making authority.[280]

3. Exclusion of Non-Citizens

In *Trump v. Hawaii*, the Court upheld a proclamation by President Trump that excluded persons from eight countries (including six Muslim-majority countries) from entering the United States.[281] It did so principally on the basis of 8 U.S.C. § 1182(f), which authorizes the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States."[282] The Trump "travel ban" was sufficiently broad that it might have triggered the major questions doctrine. But the Court (and the concurring and dissenting

279 We say "properly authorized" to flag a further complication here raised by the evidence in the database underlying the analysis by Eichensehr and Hathaway. That database reveals that almost one-fifth of the legal authorities cited in support of congressional–executive agreements in fact "offer no support" for such agreements. *Id.* at 637, 689. The legitimacy of these congressional–executive agreements turns on many factors, including how to read the historical practice of making them.

280 *See id.* at 633.

281 Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

282 8 U.S.C. § 1182(f).

Justices) did not mention the doctrine. Their failure to do so is consistent with our approach.

On the substantive canon view, the applicability of the major questions doctrine turns on the presence of an independent presidential power. The existence of this power in the context of *Trump v. Hawaii* has some support. Most notably, in *Knauff v. Shaughnessy*, the Court stated, in the context of rejecting a nondelegation challenge to a broad congressional authorization to the President to exclude non-U.S. citizens, that the right to exclude such individuals "is inherent in the executive power to control the foreign affairs of the nation."[283] The existence of such an executive power is contested and ultimately beyond our present concern.[284] But if the President does possess relevant independent power in this context, then delegation concerns based on broad authorizations are diminished and, on the Gorsuch view, the major questions doctrine would not apply.[285] As the Court in *Knauff* stated, "because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power."[286]

The same conclusion follows for different reasons from the congressional intent approach. Immigration clearly concerns foreign affairs. And more significantly, there is a long tradition, stretching back to the 1790s, of Congress granting the President broad discretion to expel non-U.S. citizens.[287] Such exclusion is thus an area where it is appropriate to conclude that Congress sees comparative competence in the executive branch and can be expected to authorize exclusion with broad authorizations. As the Court

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283 338 U.S. 537, 542 (1950); *see also Hawaii*, 138 S. Ct. at 2424 (Thomas, J., concurring) ("[T]he President has *inherent* authority to exclude aliens from the country."); Sessions v. Dimaya, 138 S. Ct. 1204, 1248-49 (2018) (Thomas, J., dissenting) (canvassing "founding-era evidence that 'the executive Power,' Art. II, § 1, includes the power to deport aliens"); *cf.* Jama v. Immigr. & Customs Enf't, 543 U.S. 335, 348 (2005) (reading authorization of executive branch removal power to confer significant discretion on the President in part because a stricter interpretation "would run counter to our customary policy of deference to the President in matters of foreign affairs"); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (suggesting that the power to exclude may be concurrent).

284 For a challenge to the statement in *Knauff*, with case support and other evidence for the proposition that the President lacks independent power in this context, see Anne Y. Lee, *The Unfettered Executive: Is There an Inherent Presidential Power to Exclude Aliens?*, 39 COLUM. J.L. & SOC. PROBS. 223, 228 (2005).

285 Despite the breadth of the statutory authorization in *Trump v. Hawaii*, neither the majority nor the dissent mentioned delegation concerns. Some lower court judges, however, have thought that the statute raises such concerns. *See, e.g.*, Doe v. Trump, 418 F. Supp. 3d 573, 590 (D. Or. 2019), *rev'd*, 984 F.3d 848 (9th Cir. 2020); Int'l Assistance Refugee Project v. Trump, 883 F.3d 233, 294 (4th Cir. 2018) (Gregory, C.J., concurring), *vacated*, 138 S. Ct. 2710 (2018).

286 338 U.S. at 543.

287 The tradition began in the notorious Alien Act of 1798, which authorized the President to "order all such aliens as he shall judge dangerous to the peace and safety of the United States . . . to depart out of the territory of the United States." Act of June 25, 1798, ch. 58, 1 Stat. 570.

noted in *Trump v. Hawaii*, § 1182(f) "exudes deference to the President in every clause," and a narrow reading of it would be inconsistent with "the deference traditionally accorded the President in this sphere."[288]

4. Domestic Emergency Statutes

It is important to understand that there are limits to the logic of our argument for avoiding the application of the major questions doctrine, even in "emergency" contexts where one might expect deference to the President. There are 135 statutes that authorize the President to act in certain ways based on a President's declaration of a national emergency.[289] Many of these statutes do not plausibly implicate an independent presidential power nor contain contextual indicators of an intent to delegate broad and unusual powers to the President.

Consider *Biden v. Nebraska*.[290] That case involved the Secretary of Education's reduction or elimination of billions of dollars in federal student loan debt on the basis of the HEROES Act, a statute that authorized the Secretary to issue such waivers and modifications "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act affected by a national emergency] are not placed in a worse position financially in relation to that financial assistance because of [the national emergency]."[291] The Court ruled that the Act did not authorize the Secretary's loan forgiveness plan.[292] Part of its logic involved the major questions doctrine, which the Court said was applicable due to the "staggering" economic and political significance of the Secretary's ruling.[293]

Nothing in our approach to the major questions doctrine would compel a different result. The President has no conceivable independent power related to student loan forgiveness, so the substantive canon approach would still apply. And the Court (and Justice Barrett in concurrence) emphasized that contextual factors suggested that Congress in the HEROES Act did not intend or contemplate the Secretary's action,[294] and that the Secretary had gone far "beyond [the authority] Congress could reasonably be understood to

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288 138 S. Ct. at 2408-09; *see also Knauff*, 338 U.S. at 543 (quoting Lichter v. United States, 334 U.S. 742, 785 (1948)) ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.").

289 *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. (Feb. 8, 2023), https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use [https://perma.cc/5YRS-83MR].

290 143 S. Ct. 2355 (2023).

291 20 U.S.C. §§ 1098bb(a)(2)(A), 1098ee(2)(C)–(D).

292 *Nebraska*, 143 S. Ct. at 2362.

293 *Id.* at 2373.

294 *Id.* at 2368-75.

have granted" in the Act.[295] We take no position here on the accuracy of these conclusions. We simply invoke this case to show that our approach would not exempt from the major questions doctrine statutory emergency powers when the exemption cannot be justified by reference to one of the aims of the doctrine.

CONCLUSION

As a matter of constitutional structure and doctrinal coherence, it does not make sense to posit a foreign affairs exception to the nondelegation doctrine. Nevertheless, delegation concerns should be seen as attenuated when Congress authorizes executive branch action related to independent presidential power. A focus on independent presidential power rather than the general category of foreign affairs reveals that the qualification is both broader and narrower than previously thought. It is broader in the sense that it applies in some purely domestic contexts. But it is narrower in the sense that at least a few important statutory authorizations to the President in the foreign relations field, such as IEEPA, likely do not implicate an independent presidential power and thus cannot receive the benefit of the qualification to the nondelegation doctrine.

It remains to be seen whether and to what extent the Supreme Court will reinvigorate the nondelegation doctrine. In the meantime, most of the life of the doctrine will likely be found in the realm of statutory interpretation rather than constitutional review, including most notably under the major questions doctrine. The same pattern that we have described holds there: there is no categorical exception from the major questions doctrine for foreign affairs, but the doctrine by its terms will often lack bite in foreign affairs contexts. This conclusion follows not from a general foreign affairs exceptionalism but rather from an assessment of independent powers and a fine-grained analysis of the operation of particular statutes and their historical backdrop.

295 *Id.* at 2384 (Barrett, J., concurring) (citing West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022)).